Supreme Court, U.S.
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In The
Supreme Court of the United States

MICHAEL E. GREENE AND
MICHAEL E. GREENE, P.A.,

Petitioners,

v.

BERGER SINGERMAN, P.A., AND
MHR INSTITUTIONAL PARTNERS LP,
MHR CAPITAL PARTNERS LP, MHRM PARTNERS LP,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Sanctions were sought against Greene after he alleged that Berger Singerman had backdated evidence, concealed an insider's control over a Debtor in Possession, and otherwise deceived Greene's client. Berger Singerman drafted the summary judgment and sanctions opinions, both designed to conceal its bankruptcy fraud and to silence Greene, a former Tax Division, Department of Justice attorney. The District Court was actually led to believe that it had decided the same summary judgment issues in an earlier appeal and sanctioned Greene for appealing. The District Court also relied upon findings, made without notice or hearing, that Greene had acted improperly. The two opinions contain numerous misstatements of law, e.g., Berger Singerman had no fiduciary duty to Greene's client.

1. Whether the Court of Appeals sanctioned a departure from the accepted and usual course of judicial proceedings where the Bankruptcy Court's sanctioning of Greene was contrived in order to discredit Greene and to protect Berger Singerman from prosecution for bankruptcy fraud.

2. Whether the coordinated fraud on the Bankruptcy Court by Berger Singerman and MHR, warrants an investigation under this Court's supervisory powers into the setting aside of the fraudulently begotten judgments in the Bankruptcy Court, as stated in *Chambers v. NASCO*, 501 U.S. 32, 44 (U.S. 1991) as being "necessary to the integrity of the courts."

3. Whether the Bankruptcy Court afforded Greene due process and exercised the restraint and discretion in imposing sanctions contemplated by *Chambers v. NASCO*, 501 U.S. 32, 44 (U.S. 1991).

PARTIES BELOW

Michael E. Greene

Michael E. Greene, P.A., a Florida Professional Association (solely owned by Michael E. Greene)

Edward L. Rothberg

Weycer, Kaplan, Pulaski & Zuber, a Texas Professional Association

Leasing Associates, Inc., a Nevada Corporation

Berger Singerman, P.A. a Florida Professional Association

MHR Institutional Partners LP, MHR Capital Partners LP, MHRM Partners LP (collectively "MHR")

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PUBLISHED REPORTS

No decision was published. The Eleventh Circuit opinion starts at App 1a. The District Court opinion starts at App 5a. The Bankruptcy Court opinion starts at App 19a.

JURISDICTION

The Eleventh Circuit Court of Appeals entered a per curiam decision on February 11, 2005, affirming the district court. The order of the United States District Court for the Southern District of Florida affirming the Bankruptcy Court judgment was entered March 5, 2004. The underlying judgment sought to be reviewed was entered by the U.S. Bankruptcy Court for the Southern District of Florida on July 29, 2003. The present Petition for Writ of Certiorari is filed within 90 days of the Eleventh Circuit decision.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254and 2101(c), and Rule 10(1)(a) & (c) of the Rules for the U.S. Supreme Court.

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STATEMENT OF THE CASE

Background:

Sanctions were awarded to Berger Singerman ("BSPA") by the Bankruptcy Court against attorney Michael E. Greene and Michael E. Greene, P.A., (collectively "Greene") under the court's inherent power. The sanctions were based on numerous contrived grounds described in the Court's opinion of July 29, 2003 ("Sanctions Opinion"). In reality, the sanctions were imposed to quiet Greene who reported a fraud on the Bankruptcy Court by BSPA. The Sanctions Opinion misstates the positions taken by Greene, misstates controlling New York law and contrives "controlling Second Circuit law", and selectively quotes from cases relied upon by Greene – omitting the parts he relied upon and then criticizing Greene because the case as selectively quoted does not stand for what he said. Most of the contrived error relates to the interpretation of statutes and legal precedent. For example, BSPA cites one case for the proposition that BSPA, as attorney for the Debtor in Possession, had no fiduciary duty to Greene's client, a creditor. That absurdity is addressed below.

The adversary complaint filed September 14, 2001, sought to enforce a subordination provision, and depended on construction of provisions in a loan agreement construed

under New York law. MHR Institutional Partners LP, MHR Capital Partners LP, and MHRM Partners LP (collectively "MHR") made a loan to the Debtor, U.S. Pool Corp., in February 2000. MHR was a secured lender under the Note Purchase Agreement ("NPA") and related documents. The NPA contained a subordination provision which provided that vehicle lessors would be paid before MHR. Leasing Associates, Inc. ("LAI") leased vehicles to the Debtor after reviewing the NPA. On November 30, 2001, the first amended complaint added claims against MHR for equitable subordination, violation of fiduciary duty, and misrepresentation.

A summary judgment decision (hereinafter "Memorandum Decision") (App 32b et seq.) was entered after LAI sought leave to further amend the complaint to assert claims against BSPA for violation of fiduciary duty and misrepresentation. The factual findings in the Memorandum Decision of misrepresentation and mischaracterization by Greene and Rothberg came without notice or hearing. BSPA drafted the decision and said what it pleased despite due process requirements. The outrage generated by the Memorandum Decision was so pervasive that the District Court became convinced that it had previously decided the same issues that were resolved in the summary judgment. It sanctioned Greene for filing a frivolous appeal based solely on the contrived findings of the Memorandum Decision, quoting verbatim.

Greene's co-counsel, Edward Rothberg, his firm, and their client, LAI, settled all sanctions issues with BSPA and MHR after the District Court awarded sanctions for a frivolous appeal of a summary judgment against LAI on the first amended complaint before LAI's time to oppose the motion was up. The Memorandum Decision was used

by the Bankruptcy Court to support the Sanctions Opinion (App 19a et seq.), as if it were *stare decisis*.

Course of Proceedings:

On July 9, 2001, U.S. Pool Corp. filed under Chapter 11. Edward Rothberg, Esq., of Houston, Texas, entered an appearance for LAI on July 13, 2001. A Sale Order was obtained by MHR to purchase the Debtor's assets for a credit bid, on August 22, 2001. LAI had leased numerous vehicles to the Debtor, and ultimately suffered a loss of over $300,000. On September 14, 2001, LAI filed an adversary complaint to enforce its contractual subordination rights of the NPA.

The basis for jurisdiction in the Bankruptcy Court was 28 U.S.C. Sections 157(a) and 1334(b). The NPA provided that vehicle lessors which leased to the Debtor would receive payment prior to MHR for any damages it suffered due to a default of lease payments. This resulted in favorable lease terms. The NPA also contained a disclaimer provision preventing enforcement by anyone not a party to the NPA.

LAI never got a copy of the NPA as promised, and Ron Janak, LAI's credit manager (who had reviewed the document in February 2000) tried to get a copy before telling Rothberg about it. Rothberg obtained a copy of the NPA from Cloyd on Friday, September 7, 2001. Greene was retained as local counsel on September 12, 2001.

On September 14, 2001, LAI also filed a motion under Rule 60(b) to modify the Sale Order which provided for a sale by credit bid to MHR, and which did not mention LAI's subordination rights. LAI never argued that the Sale Order prevented LAI from asserting subordination rights. The Sale Order did not terminate or

modify the subordination. It did not affect inter-creditor contracts. LAI wanted to somehow preserve the proceeds of the sale pending the adversary case on subordination.

The hearing on the Rule 60(b) motion was on October 12, 2001. The Bankruptcy Court determined that the Rule 60(b) threshold was not reached and denied the motion based on that failure. No other issue was resolved or even argued. The Rule 60(b) orders are found at App 1c-4c. They say nothing about the Sale Order precluding subordination. LAI appealed to the District Court, which affirmed. (App 22c-24c) LAI appealed and the Eleventh Circuit denied LAI's motion for a stay. On January 4, 2002 LAI moved for dismissal of its appeal due to the mootness which the impending sale would create.

On November 28, 2001, LAI obtained leave to file an amended complaint to add counts for equitable subordination, violation of fiduciary duty, and misrepresentation against MHR. At the hearing MHR argued that *res judicata* prevented the proposed amendment of the complaint (App 12c-15c). The Bankruptcy Court specifically found that *res judicata* did not apply. (App 17c). (Nevertheless, Greene was later sanctioned by the same Court for filing the amended complaint, based on claim preclusion.)

MHR filed a motion for summary judgment on December 10, 2001. LAI filed an opposition to the motion and a cross-motion for summary judgment based on construction of the NPA on January 3, 2002 (excerpts at App 47c et seq.). LAI supplemented its opposition to the motion on March 29, 2002, after limited discovery (App 23c-40c). The opposition and supplement contain much more accurate descriptions of LAI's positions than the Memorandum Decision.

On March 6, 2002, LAI moved for leave to further amend its complaint to add BSPA as a defendant, and to add grounds to the counts for violation of fiduciary duty and misrepresentation, amounting to a fraud on the Court. A hearing on the motion was preempted when BSPA filed an emergency motion to shorten the safe harbor period, and the motion to shorten time was heard first. LAI was given two weeks to respond. At the suggestion of Paul Singerman, LAI agreed to withdraw its motion for leave to amend without prejudice pending review of the Rule 11 motion.

The Court granted summary judgment, and denied the renewed motion for leave to amend as futile. The District Court affirmed on November 20, 2002. MHR and BSPA filed motions for appeals sanctions which the District Court granted before LAI's response was due. The District Court's initial basis for appeals sanctions was stated as: "The Court finds the appeal in this case is without merit and frivolous, as the Order of the Bankruptcy Court disposed of all issues in this litigation."

LAI's opposition was timely filed after the sanctions order was entered. After a hearing to determine damages, the District Court was asked by Greene to reconsider and to make specific findings of bad faith by Greene. The Court ultimately described the basis for the sanctions as the Sale Order having preclusive effect over the subordination provision. The Court also stated that "LAI maintained that the Sale Order's [sic] Note Purchase Agreement ("NPA") allowed it to bring claims against MHR under a "subordination agreement." (App 20b), which makes no sense. Greene's specific bad-faith misconduct was described by quoting findings of misconduct from the Memorandum Decision. (App 20b-21b). The Memorandum

Decision falsely says "many of the issues raised in this adversary proceeding have already been the subject of litigation and final orders entered in the main case" (App 34b). The District Court (App 22b) and the Eleventh Circuit (App 10b-11b) believed an illusory first appeal had already determined that the Sale Order precluded subordination, and LAI was in a "relentless pursuit".

The first ruling on claim preclusion was that there was no bar due to *res judicata* and leave to amend was granted November 28, 2001. The next ruling reversed the first in the Memorandum Decision. The appeal was seen by the District Court as a relentless pursuit by Greene. The District Court's judgment appeared to be tainted by outrage over the unethical things described in the Memorandum Decision.

The District Court said it had heard an appeal on the same issues before (App 22b). That is just false. The appeal of the summary judgment to the Eleventh Circuit was dismissed by LAI as part of the settlement. Greene appealed the appeals sanctions and lost. The Eleventh Circuit also focused upon the Memorandum Decision for its facts. For example, the Eleventh Circuit said that LAI argued "that the Sale Order prevented it from asserting its subordination rights . . . " (App 6b). That makes no sense, and did not happen. With so much disinformation in one decision it is difficult to keep the facts straight, or understand what actually happened. The disinformation was not due to negligence, but the result of a wilful fraud on all the courts which have considered this case.

Facts Regarding the Fraud on the Court:

It wasn't easy for Rothberg to obtain the NPA. Rothberg did not know which document contained the

subordination clause. He sent a letter to Cloyd by telefax on August 7, 2001:

> It is our understanding that *MHR executed* an agreement which effectively subordinates its debt to the claim of Leasing Associates. I would appreciate your forwarding me a copy of this document. If you do not have it, please let me know who is representing MHR so I can obtain a copy.

Rothberg received an e-mail from Cloyd on the morning of August 22, 2001, containing a literally correct but misleading response which first changed Rothberg's request so she could make a smooth denial. She said:

> I received a fax while I was out on vacation requesting a subordination *between MHR and Leasing Associates*. I am not aware of *such a document*. Wouldn't your client have it and be a party? As far as I know, MHR is in first place on all assets except leased assets, which would be in the leasing company's name.

She was aware of the subordination clause of the NPA, however. Discovery uncovered a June 22, 2001, e-mail from Cloyd in which she requests review of the "subordination clause" of the NPA, discussed further below.

After receiving Cloyd's response, Rothberg did not believe he had reasonable grounds to seek to modify the Sale Order. He was skeptical about the unusual subordination. Rothberg did not begin to realize he had been deceived by Cloyd until near the end of the hearing on that motion on October 12, 2001. Based on the evasive testimony of Ms. Cloyd at that hearing (excerpt at App 40c et seq.), LAI orally added the issue of fraud.

After Cloyd's negative response, Janak told Rothberg to ask for the "loan documents". Rothberg sent an e-mail

on August 23, 2001, and Cloyd responded that the loan documents were put into evidence by her at the sale hearing the previous day, and that she would make copies for him. He got them two weeks later when it was too late to act.

Unbeknownst to Rothberg, Cloyd sent an e-mail on June 22, 2001, which said in part: "Dan *the client* also wants you to look into the subordination clause on the truck lease and how it affects, if at all, the MHR lien. Please work with Chuck on this." Her June 22 e-mail was sent to "Chuck" Throckmorton (MHR's local attorney), Hal Goldstein (MHR's attorney and administrator in New York), with copies to Richard Andron (U.S. Pool's president), Paul Singerman, Brian Rich, and Daniel Lampert (attorneys with BSPA).

Cloyd was asked in her deposition in February 2002, about her use of the term "subordination clause" in that e-mail. She answered: "There was some sort of language in the documents that no one seemed to know what it meant. It referred to . . . permitted vehicle leases, if there were any being subordinated to payment under certain circumstances to the senior debt. . . . "

On June 27, 2001, Lampert, sent a copy of page 7 of the Note Purchase Agreement to Throckmorton by telefax. Page 7 contains the subordination provision ("permitted vehicle lease") in favor of "any" vehicle lessors who lease to U.S. Pool. One version of the First Supplemental Agreement ("FSA") to the NPA had been executed on or about May 31, 2001. That version does not mention subordination. Copies of e-mails establish that the last draft of the FSA was attached to an e-mail dated July 6, 2001, and an e-mail response shows that the last draft was approved by Hal Goldstein of MHR on July 6, 2001. That draft contains

a new provision, deleting all reference to the subordination clause of the NPA in paragraph 2.

The FSA provided to the Court by BSPA was the backdated version created after Cloyd's e-mail. LAI declared a default on July 2, 2001, making the date of the FSA critical. Lampert testified that he drafted the later version on or about June 1, but refused to produce subpoenaed documents of his records regarding the FSA. When Greene sought to compel production prior to the sanctions hearing, the Court ordered Greene not to take any more discovery. There actually was a "final first supplemental agreement; with final loan numbers" which was attached to an e-mail from Dan Lampert, dated June 1, 2001. However, that "final first supplemental agreement" did not mention subordination.

BSPA wilfully concealed MHR's control of the Debtor. Charles Throckmorton told BSPA how to describe MHR's presence on the board: "[I]n the sections of the various documents where you define MHR, simply add the following sentence at the end: MHR is also the owner of 100% of the Debtor's Series A Convertible Preferred Stock and, in accordance with the rights incident to such *ownership*, is represented on the Debtor's Board of Directors." BSPA's first day filings first contained and then were changed to omit "is represented on the board", and as filed said instead substituted: "[MHR] has the right (which MHR has not yet exercised) to elect a majority of the members of the Debtor's Board of Directors."

Hal Goldstein of MHR gave directions to BSPA regarding the bankruptcy filing of the Debtor. In an e-mail dated May 30, 2001, Dan Lampert tells Chuck Throckmorton "if hal is happy, i am happy". In another e-mail, Ms. Cloyd responds to Hal Goldstein, "in the same order as

your email this morning . . . we will need our bkc retainer of $35,000 plus $2500. Also we have about $15,000 in prepetition fees unpaid after applying all the money on hand in trust."

In her employment application Ms. Cloyd stated that "Berger Singerman received checks totaling $37,500 consisting of a $35,000 fee retainer, and a $2500 cost deposit for the representation of Debtor in its Chapter 11 bankruptcy case and certain work leading up to that bankruptcy filing." (*Id.*) The application does not indicate who supplied the checks. None of those connections with MHR, including payment of legal fees, if MHR paid them, are disclosed in BSPA's employment application.

Mark H. Rachesky (the majority principal of the MHR entities) was one of the two board members of the Debtor when the petition was filed. The other board member, Richard Andron, was picked by Mark H. Rachesky to replace the majority shareholder of the common stock when he resigned in January 19, 2001. The selection was announced in a letter from Rachesky to the board.

ARGUMENT

1. The Bankruptcy Court's Sanctions Opinion is so unfounded and irregular that it can only be explained as a sham designed to discredit Greene's allegations of fraud on the court and to protect BSPA from prosecution. The argument will demonstrate the corruption of the Sanctions Opinion.

2. The Sanctions Opinion, drafted by BSPA, was part of the coordinated fraud on the Bankruptcy Court by BSPA and MHR. An investigation under this Court's supervisory powers into the facts outlined above, which are based mainly on documents provided by MHR, MHR's local

counsel, and BSPA in discovery, should result in the setting aside of the fraudulently begotten judgments in the Bankruptcy Court, as stated in *Chambers v. NASCO*, 501 U.S. 32, 44 (U.S. 1991) as being "necessary to the integrity of the courts."

3. BSPA's Memorandum Decision contained factual findings of misconduct by Greene without notice or an opportunity to respond. Those findings were later used to bolster BSPA's Sanctions Opinion. New grounds for sanctions were raised during the sanctions hearing.

The ambush procedure and contrived grounds on which sanctions were based did not show the exercise of restraint and discretion in imposing sanctions contemplated by *Chambers v. NASCO*, 501 U.S. 32, 44 (U.S. 1991).

The Bankruptcy Court stated in the Memorandum Decision the following contrived basis for avoiding the equitable claim and fraud claims. (App 33b-34b):

> This ruling by itself disposes of the remaining claims, since if LAI had no enforceable subordination rights in the first place, **it could not have been injured by** any of the supposed inequitable conduct, **breaches of fiduciary duty or misrepresentations** which LAI asserts in the remaining counts of the Amended Complaint. In any event, **LAI's remaining claims are all barred under principles of res judicata** and/or collateral estoppel as a result of this Court's entry of the order approving the sale of US Pool's assets to MHR . . . .

The same Court which found *res judicata* above also granted leave to amend the complaint in the face of MHR's *res judicata* argument. That issue is dealt with below. The same Court which found BSPA's concealment of control by

the secured party harmless, also decided *Dzikowski v. Tri-o-clean Systems, Inc.* (*In re: Tri-o-clean, Inc.*), 230 B.R. 192 (Bankr. S.D. Fla. 1998), in which the Court stated:

> The United States Supreme Court in the leading case of *Pepper v. Litton*, 308 U.S. 295, 306, 84 L. Ed. 281, 60 S. Ct. 238 (1939) established the principle of **"strict scrutiny" when considering the claims of insiders against a Debtor**. When the claim of an insider is challenged, the burden is on the insider not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. *See id.* **Claims alleged by insiders "are allowable when honest and 'bona fide', but the bona fides must be demonstrated beyond cavil and examined with a large measure of watchful care."**

A finding of no enforceable subordination rights somehow made the fraud of BSPA harmless (even though full disclosure was mandatory and at least Rothberg was deceived). The Sanctions Opinion went so far as to hold that BSPA had no fiduciary duty to LAI, contrary to numerous cases, also discussed below.

BSPA represented the Debtor in the Chapter 11 case, and represented the secured creditor as well, without disclosing the dual representation. In *United States v. Gellene*, 182 F.3d 578, 597 (7th Cir. 1999) the Court said of an attorney for a Debtor in Possession convicted of bankruptcy fraud:

> His undisclosed representation of the senior secured creditor of the debtor certainly created a potential if not actual conflict of interest and thus was a breach of his position of trust with the debtor. Mr. Gellene also abused his position

> of trust as an officer of the bankruptcy court by using his fraudulent sworn document to verify his perjurious sworn testimony.

Fraud and deception practiced on the Court were practiced in the first day filings. The Memorandum Decision stated (App 37b) that the parties dealt at arm's length in negotiating the sale, quoting from the sale order which also was drafted by BSPA. Yet, the buyer controlled the seller as BSPA well knew. The Sanctions Opinion (App 22a) says the "purchase was negotiated in good faith and without collusion", but does not mention "arm's length".

In *Chambers v. NASCO*, 501 U.S. 32, 43-45 (U.S. 1991), this Court said:

> This "historic power of equity to set aside fraudulently begotten judgments," [*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944)] at 245, is necessary to the integrity of the courts, for "tampering with the administration of justice in [this] manner . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." Id., at 246. Moreover, a court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud. [*Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (1946)] at 580.

Greene had no ethical choice but to protect LAI by exposing BSPA, and he and his family has suffered grievously as a result. Greene expected more from the courts. BSPA now represents LAI, due to the settlement, in a malpractice action in Florida State Court, and has obtained a judgment of $289,000 for malpractice against Greene based on the corrupt record of the instant case. BSPA gets its fees paid plus $140,000 before LAI gets anything. BSPA would not allow LAI to answer requests

for admission about the fraud in this case, and got a protective order from an outraged judge.

The grounds for the Bankruptcy Court sanctions will be analyzed below, although it is not possible to discuss in detail all of the defects in the 62-page Sanctions Opinion in this petition.

First Category: Greene argued that New York law would *likely* find MHR's position offensive to public policy (App 58c) and would not treat a disclaimer precluding enforcement of a contract by a third party as decisive where the contract also contained an explicit provision benefitting the third party, especially where the third party relied upon the provision.

The Memorandum Decision falsely states LAI's position (App 49b):

> Both MHR and **LAI contend that the NPA is unambiguous** and can be interpreted without reference to extrinsic evidence, but obviously reach dramatically different conclusions as to its meaning.

LAI took the position that the subordination provision "unambiguously" gave LAI subordination rights, but contended that the NPA itself was ambiguous because it gave LAI an explicit benefit and then purported to take it away. (App 48c & 52c-53c) Refer to LAI's opposition (App 47c et seq.) and supplement (App 23c et seq.) as the best evidence of what Greene did or did not do that might be worthy of sanctions. The utter deception of the Memorandum Decision requires a look at the source.

Selective quotation was also used to support the Sanctions Opinion. District Court Judge Martens of

Kansas distinguished *Nepco*[1], in *Hossain v. Raucher Pierce Refsnes, Inc.*, 46 F.Supp. 1164 (D. Kan. 1999) (hereinafter *Hossain I*). *Nepco* is a New York Appellate Division decision which held that a disclaimer of enforcement of a contract by a third party is conclusive. The following are quotes from the Sanctions Opinion, the second of which contains a selective quote (App 36a & 37a-38a):

> For example, LAI claimed that *Nepco* was "an example of a line of cases where the court ostensibly relied on one catch-all clause in a contract as dispositive where the putative third party beneficiary had little or no chance to prevail regardless of the 'dispositive' clause." **The argument advanced by LAI that the "real crux" of these decisions was anything other than the third party disclaimer provision is unsupported** by a reading of the cases.
>
> * * *
>
> The *Hossain* case is also unpersuasive. *Hossain* involved a lawsuit by a securities customer against a clearing house based on the clearing agreement between the customer's broker and the clearing house. The court therein distinguished the *Nepco* line of cases by identifying a specific public policy concern – a clearing broker's non-waivable duties to investors imposed by law which create a fiduciary relationship between the clearing broker and customer – while *Nepco* involved only private contractual relations. *Hossain,* 46 F.Supp. at 1167, 1169 (**"*Nepco* can be distinguished from the present action. The landlord was under no duty**

[1] *Nepco Forged Products, Inc. v. Consolidated Edison Co. of New York*, 99 A.D.2d 508, 470 N.Y.S.2d 680 (N.Y. App. Div. 1984).

> **imposed by law to provide utility service to its subtenants. The duty to provide utility service was a contractual one on the part of ConEd."**). LAI did not, and could not, argue that MHR had any legal duty to subordinate its claim to LAI. Accordingly, there was no reasonable basis for arguing that *Hossain* provided any support for disregarding the "No Third Party Beneficiaries" clause in the NPA.

The next two sentences of *Hossain I* follow what was quoted parenthetically, in bold above: "Furthermore, the holding of the court in *Nepco* was unnecessary. There was no valid third-party beneficiary claim asserted against the landlord." Greene relied upon the very language which BSPA omitted. (App 56c-57c)

LAI relied upon another non-New York case in its opposition:

> A Minnesota Court, following the Restatement (Second) of Contracts also rejected the argument that a disclaimer expressing an intent not to benefit third parties preempted any other provisions of a contract affirmatively showing an intent to benefit a third party. *Twin City Construction Company of Fargo, N.D. v. ITT industrial Credit Company,* 358 N.W.2d 716, 718-719 (Minn. Ct. App. 1984).

Greene was sanctioned for citing the Minnesota case because Greene did not argue that Minnesota law did not have controlling precedent like New York law. However, the New York Court of Appeals has not decided this narrow issue. Additional cases were later found. They *are Coronet Insurance Company v. GACC Holding Company*, 1991 U.S. Dist. Lexis 12120 (N.D. Ill. August 30, 1991) (applying New York law in ignoring a disclaimer); *Oil Capital Racing Association, Inc. v. Tulsa Speedway, Inc.*,

628 P.2d 1176 (Okla. Civ. App. 1981) (explicit intent to benefit third parties negated a disclaimer). One more case was added in the appeal to the Eleventh Circuit: *Versico, Inc. v. Engineered Fabrics Corporation*, 238 Ga. App. 837, 520 S.E.2d 505 (1999) (ambiguity created by disclaimer and explicit benefit to third parties).

The controlling law of New York regarding construction of contracts in general is found in *R/S Associates v. New York Job Development Authority*, 98 N.Y.2d 29, 771 N.E.2d 240, 744 N.Y.S.2d 358 (2002):

> We have long adhered to the "sound rule in the construction of contracts, that where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language" [citations omitted].

As LAI's opposition pointed out, the Second Circuit, in *In re United Merchants and Manufacturers, Inc.*, 623 F.2d 804, 807 (2d Cir. 1980) stated: "if possible, effect must be given to every sentence of an instrument". Greene has been sanctioned for arguing how the New York Court of Appeals would likely decide the conflict. It would not reward fraud. The District Court sanctioned Greene for not giving meaning to all provisions of the NPA, quoting the Memorandum Decision verbatim. However, LAI argued that the NPA was ambiguous, not allowing meaning to be given to every word (App 53).

Another misleading quote is found in the Sanctions Opinion regarding *Hossain I* (App 38a):

> Perhaps even more significant is that subsequent published decisions in the *Hossain [I]* case reflect that the court ultimately **receded** from the "public policy" ruling relied on by LAI, and ultimately granted judgment to the defendant on the third party beneficiary claim, relying in part on the

> third-party disclaimer. *Hossain [II] v. Rauscher Pierce Refsnes, Inc.*, 97 F.Supp.2d 1237 (D. Kan. 2000), *aff'd*, 15 Fed.Appx. 745, 2001 WL 876392 (10th Cir. 2001).

The quote above in bold type needs context. In *Hossain III*, the Tenth Circuit in *affirmed* both earlier decisions, and stated at p. 749:

> The district court concluded that Hossain's showing at trial had failed to satisfy the Kansas third-party beneficiary requirements. The district court found that Hossain's evidence failed to: (1) show that the contracting parties intended to benefit third parties; (2) contradict the express contractual disclaimer of such an intent; or (3) demonstrate that Hossain knew of and relied on the contract. We find no fault with the district court's determination. [emphasis added].

According to *Hossain III* and Shepards, *Hossain I* was affirmed by *Hossain III*. *Hossain I* is not even cited in *Hossain II*. Kansas law did not change – the facts did.

Second Category: Greene's legal argument, under *Allegaert v. Chemical Bank*, 657 F.2d 495 (2d Cir. 1980) and the New York UCC, that an assignment of a security interest was not a prerequisite to a valid subordination by a secured creditor; and that the failure of a senior creditor to obtain a lien is normal.

The Sanctions Opinion, first citing the Memorandum Decision instead of *Allegaert*, and then paraphrasing *Allegaert* without a page reference, introduces this category as follows (App A):

> Based upon the plain language of the NPA and controlling Second Circuit authority, the Memorandum Decision determined that even if the NPA created enforceable subordination rights in favor of LAI, such rights would not apply to

> MHR's exercise of its remedies as a secured creditor, including its right to credit bid at a sale of its collateral. The Court noted that the "Permitted Vehicle Lease" definition relied on by LAI specifically stated that "no lessor shall have rights of a secured creditor," and moreover under New York law as determined by the Second Circuit Court of Appeal, the effect of a perfected security interest is superior to a subordination agreement such that a creditor still had the right to receive the proceeds of its collateral without regard to a subordination. *Allegaert v. Chemical Bank,* 657 F.2d 495 (2d Cir. 1980).

The statement regarding the NPA's provision denying LAI "rights of a secured creditor" is a red herring. LAI never claimed to have a lien on the Debtor's property. The *Allegaert* case does not invalidate the subordination provision of the NPA, as the Sanctions Opinion implies. New York UCC Section 9-339 states: "This article does not preclude subordination by agreement by a person entitled to priority." Section 1-109 states: [A] creditor may subordinate his right to payment of an obligation by agreement with either the person obligated or another creditor of the person obligated. **Such a subordination does not create a security interest. . . .**" LAI's position can be summed up as:

> When lien priority is subordinated, the junior creditor [MHR] retains the lien, the right to payment thereunder, and the right to foreclose for default. The only thing assigned is the right to first "dibs" at the collateral. This does not constitute a transfer of the lien.

Robert M. Zinman, *Under the Spreading Bankruptcy: Subordinations and the Codes,* 2 Am. Bankr. Inst. L. Rev. 293, 308. [Professor of Law, St. John's University School of Law. Professor Zinman is a Director of the American

Bankruptcy Institute and Co-chair of the Advisory Board of the *American* Bankruptcy Institute.] The above position of Professor Zinman has been ignored by the Courts, including the Bankruptcy Court.

The Sanctions Opinion again refers to the summary judgment Memorandum Decision for authority:

> In subsequent pleadings, LAI made the claim that the subordination provisions were "stripped" from the loan agreement at issue in the *Allegaert* case. The [Bankruptcy] Court's Memorandum Decision found that this also was "a misstatement of the facts of the case." Commenting upon *Allegaert,* the [Bankruptcy] Court noted that the loan agreement had been amended "in order to be *consistent* with the Pledge Agreement" granting a security interest in certain property to Chemical Bank, and that "[t]hus, the Chemical Bank loan remained subordinated but was also collateralized by the debentures." . . . Indeed, that was the very reason why the *Allegaert* court had to determine the relative priority of the subordination provision and the security interest.

The Sanctions Opinion quotes from the Memorandum Decision to describe what the *Allegaert* case says. Compare the first part of the Memorandum Decision quoted above to *Allegaert* at p. 508: "Since the $ 2,233,333 payment to Chemical Bank was made pursuant to the PA's security interest, it is not affected by the subordination provisions of the SLA, and does not remain subordinated to senior claims." The *Allegaert* Court did not have "to determine the relative priority of the subordination provision and the security interest." That is what MHR would like the law to be – security agreement trumps subordination agreement.

The Second Circuit had earlier said that the subordination provision of the SLA had to be modified so as not to make the PA meaningless, at page 504:

> Thus the amended SLA was to be construed consistently with the PA, and not *vice-versa*. Paragraph 8 modified Paragraph 3 so that it was to be construed consistently with the PA. If the restrictive provisions of Paragraph 3 had not been so modified, the PA would have been rendered meaningless, for it would have created a "security interest" which attaches only after default, totally destroying the value of the pledge.

Paragraph 3 contained the subordination provisions, inter alia. The Second Circuit addressed the issue again after deciding there was no preference, at page 508:

> However, as is clear from the above discussion, the parties amended the subordination and no-security provisions of the SLA by entering into the PA security interest. And under the NYUCC, the security agreement between Walston and Chemical Bank was effective as against creditors notwithstanding the existence of a subordination agreement. . . .

The perfection by Chemical Bank of its security interest under the PA and the amending of Paragraph 3 destroyed the senior subordination provisions of the SLA as amended. Whether they were stripped or not effective seems academic. It is clear that the senior creditors lost their seniority because of the amendment of the SLA.

Third Category: Greene's legal argument that the claims in the amended complaint were not precluded by *res judicata*.

The Sanctions Opinion, once again relying for authority on the Memorandum Decision states:

> The Court concluded that the LAI adversary proceeding "ultimately represent[s] nothing more than an impermissible collateral attack on the Sale Order, after LAI's Rule 60(b) Motion and Motion for Reconsideration were denied, . . .

The extent of the issues decided in the Rule 60(b) motion has been discussed above. On November 28, 2001, the Court granted LAI's motion for leave to amend the complaint to add counts for equitable subordination, violation of fiduciary duty, and misrepresentation. At the hearing the Court stated: "Mr. Rosendorf, I've taken a look at the complaint. They are not one and the same, and it is not *res judicata* as to the issue raised in the complaint, in the amended complaint."

In addition, in *Lawrence v. Wink*, 293 F.3d 615, 620 (11th Cir. 2002), the Court stated:

> We begin by observing that application of *res judicata* appears to produce an anomalous result under circumstances such as these where the plaintiffs argue that they had no inkling of (and could not have discovered through due diligence) the facts underlying their fraud claims during the sale order proceedings in the Bankruptcy Court.

LAI was in no position to allege fraud on the Court when filing the Rule 60(b) motion. Also, the extensive fraud on the Court would justify a collateral attack.

Claim preclusion relating to a sale order came up in *In re Lunan Family Restaurants*, 194 B.R. 429, 445 (Bankr. N.D. Ill. 1996). The Court stated that collateral estoppel did not apply to preclude review of subordination agreements, even though the parties had argued the subordination issue before the sale order was approved. The Sale Order does not affect inter-creditor rights.

Fourth Category: Greene's alleged unsupported factual assertions.

The Sanctions Decision stated:

> LAI claimed in its Amended Complaint, filed November 2001, that it did not object to the sale motion based upon "LAI's Houston counsel having no document to support its subordination rights from either LAI or the Debtor in Possession." LAI also claimed in its Jan. 3rd Memorandum that LAI's vice president of credit, Ron Janak, "was unable to provide Mr. Rothberg with specific information about the NPA in early August 2001."

Since Janak was unaware that he had two pages of the NPA in his files, he could not have given them to Rothberg. Rothberg testified that he had Janak look for subordination documents before he sought them from the Debtor. Greene first got involved in the case on September 12, 2001, *after* Rothberg had received the NPA from Cloyd. Greene did not ask for a search for the NPA because Rothberg already had it in hand.

Furthermore, Greene represented LAI at the deposition of LAI through Scott Weinstein of LAI's Fort Lauderdale office, on October 3, 2001. Weinstein testified that he had obtained any documents from Janak in Houston that he did not have in the Fort Lauderdale office in order to produce the documents requested. Janak did not find the two pages in October when he reviewed his documents either.

The Memorandum Decision questions whether Andron was picked by Rachesky to be on the board. The evidence which was collected during the aborted discovery shows that MHR had picked Andron to take over from the majority shareholder. The drafters of the Sanctions Opinion

analyzed one letter in a vacuum, as if this was the only evidence there is of Andron's allegiance to MHR. This was a surprise issue raised at the sanctions hearing.

Greene identified what he could at the sanctions hearing while he was allowed to, i.e., until the time frame of Greene's testimony was limited by appellees. Gladstone, who introduced Andron to MHR, was not on the board. Greene concluded from the evidence he had that Gladstone recommended Andron to MHR, and MHR selected Andron to be on the board. The reason that it is obvious is the evidence shows that Morris, the majority shareholder, was being involuntarily replaced, and, according to MHR's letter, MHR had "identified" Andron to replace Morris. The board was comprised of MHR and Andron by May 23, 2001 as a result of resignations of two inside directors. It is clear that Andron was beholden to Rachesky for his position.

The statement in the Sanction Opinion that "the other individuals have no affiliation with MHR" is from out of the blue. It was not raised as an issue or proved. The depositions, correspondence and minutes of the Debtor, show that Gladstone was aligned with Rachesky. The Rachesky deposition and Andron deposition establish that Gladstone had worked with Rachesky for years prior to Andron's introduction.

Fifth Category: Fiduciary Duty. Greene's legal argument, following *Mosser v. Darrow*, 341 U.S. 267 (1951), that an attorney for the Debtor in Possession has a fiduciary duty to the estate and to creditors of the estate.

The Sanctions Opinion says: "To this day, LAI has not cited even one case standing for the proposition urged – that counsel for a chapter 11 debtor owes a fiduciary duty to an individual creditor."

This may be the most absurd statement of the Sanctions Opinion due to the plethora of cases cited by Greene. He made an argument citing at least ten cases in his March 29, 2001 supplement to LAI's opposition to summary judgment (App 35c-37c). An excerpt follows:

> The Debtor's attorney had a duty to make a reasonable inquiry of the management of U.S. POOL before making the misleading response that was made. Pursuant to 11 U.S.C. §§ 1107 and 1106, and 706(7), ... In *In re Whitney Place Partners*, 147 B.R. 619, 620-21 (Bankr. N.D. Ga. 1992) the Court stated that the attorney for a debtor in possession has a fiduciary duty to creditors and shareholders of the debtor. . . .
>
> . . .

In *In re Cochise College Park, Inc.*, 703 F.2d 1339 (9th Cir. 1982) the Ninth Circuit stated:

> A bankruptcy or reorganization trustee is a fiduciary of each creditor of the estate, including anyone who is a party to an executory contract with the bankrupt. . . . As such, he has a duty to treat all creditors fairly . . . . *Mosser v. Darrow*, 341 U.S. 267, 273-74, 95 L. Ed. 927, 71 S. Ct. 680 (1951); *[Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, 461 (6th Cir. 1982)]; [*Sherr v. Winkler*, 552 F.2d 1367, 1374 (10th Cir. 1977)] . . . . *Leonard v. Vrooman*, 383 F.2d 556, 561 (9th Cir. 1967) (trustee is personally liable for acts which either are not taken in good faith or are unreasonable).

The Sanctions Opinion relies on *ICM Notes, Ltd. v. Andrews & Kurth, L.L.P.*, 278 B.R. 117, 122-123 (S.D. Tex. 2002), *aff'd*, 324 F.3d 768 (5th Cir 2003) which states:

> . . . this duty cannot be extended to justify the imposition of a fiduciary duty running from

> counsel for the debtor-in-possession directly to a particular creditor that would support a separate civil action for breach under the circumstances of the instant case. See *Scheftner v. Foster (In re Derringer)*[sic], 132 B.R. 34 (Bankr. N.D. Cal. 1991) (concluding that the attorney for the debtor-in-possession generally owes no fiduciary duties directly to creditors).

In *Scheftner v. Foster (In re Dieringer)*, 132 B.R. 34, 37 (Bankr. N.D. Cal. 1991) the Court said: "Accordingly, the court holds that a debtor's attorney is not liable to creditors for mishandling a bankruptcy except to the extent that his conduct was fraudulent or otherwise intentionally wrongful." In *ICM Notes*, attorneys wanted to get paid as agreed and were sued for insisting on getting paid.

Sixth Category: Greene's alleged failure to adequately investigate facts.

An interim Trustee, Ms. Menotte, was appointed when the case was converted to Chapter 7 on March 15, 2002, more than two months after LAI had filed a cross-motion for summary judgment on its subordination rights under the NPA. The Sanctions Opinion describes testimony of Ms. Menotte about a conversation which took place after March 15:

> Ms. Menotte testified that she asked Mr. Greene and Mr. Rothberg if they had explored the issue of whether LAI had subordination rights under the original NPA and they responded that they had not done so. Ms. Menotte further testified that "they," *i.e.*, Mr. Greene and his co-counsel Mr. Rothberg, made a comment to the effect that they had not fully focused on the subordination cause of action as they were more interested in looking at the suit against BSPA.

The January 3, 2002, opposition to the summary judgment shows that the NPA had been fully "explored." (App 47c et seq.) LAI had cross-moved for summary judgment on the NPA. There was extensive argument made by LAI that the NPA created enforceable subordination rights in favor of LAI. Three months later LAI did not need any information from the trustee about the NPA. She then controlled the attorney-client privilege of the Debtor (and its attorneys). As trustee, she would not agree to assist in uncovering evidence of fraud.

BSPA's exhibits to its opposition to LAI's motion to add BSPA as a party, consists of e-mails dated September 10 and 11, 2003, and a letter from Rothberg dated September 11, 2001. The Monday, September 10 e-mail shows that Rothberg went to work immediately analyzing the NPA after he received the NPA from Ms. Cloyd (on Friday September 7).

Actually, it was Ms. Cloyd who was testifying through leading questions which were agreed to by Ms. Menotte. "Q. Did they then make a comment to the effect that they had not fully focused on that cause of action for subordination, but were more interested in looking at the Berger Singerman lawsuit?" Greene's objection was overruled, and Ms. Menotte agreed.

In *United States v. U.S. Gypsum*, 333 U.S. 364, 395-396 (U.S. 1948) the Supreme Court said such testimony should receive little weight when it conflicts with contemporaneous documents particularly where the issues involve a mixed question of law and fact.

In Janak's testimony at the sanction hearing, he agreed with numerous leading questions, but occasionally would ad lib. At page 113 (A 299), Janak testified "[Greene

and Rothberg] still believed that we had a good subordination – had a real good subordination agreement." Janak also testified that Greene told him the sanctions motions were a scare tactic, and were frivolous. This brief, the Memorandum Decision, and Sanctions Opinion establish how accurate Greene was.

According to the Sanctions Opinion:

> Janak testified that Mr. Greene did not ask LAI to go through its files to determine if it possessed documents that would support its subordination claim prior to LAI filing the November 29, 2001 Amended Complaint, which alleged that LAI's counsel had no documents to support its subordination rights.

Rothberg had already asked Janak to go through his files by the time Greene was retained. Greene did not know the case existed until Rothberg had the NPA. On October 3, 2001, Greene attended the deposition of Scott Weinstein who testified that he produced all documents of LAI relating to the Debtor at the deposition, and coordinated with Janak.

As this Court said in *Chambers v. NASCO*, 501 U.S. 32, 45 (U.S., 1991): "Because of their very potency, inherent powers must be exercised with restraint and discretion." In this case so far, the Court's inherent power has been abused to promote a fraud, and the victim's pleas have been ignored.

The Court should grant certiorari to prevent the willful abuse of the inherent power of the federal courts for corrupt purposes. An investigation by the Attorney General or the United States Attorney for the Southern District of Florida would seem to be appropriate. If fraud is confirmed the judgments, including the summary

judgment, against LAI and its attorneys should be vacated, and the case remanded to assess appropriate sanctions under the circumstances.

Respectfully submitted,

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11301-AA

D.C. Docket Nos.
03-80859 CV-KLR & 01-33622-BKC-PG

MICHAEL E. GREENE,
MICHAEL E. GREENE, P.A.,

Plaintiff-Appellant,

versus

BERGER SINGERMAN, P.A.,
MHR INSTITUTIONAL PARTNERS LP, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(FEBRUARY 11, 2005)

Before ANDERSON, PRYOR and HILL, Circuit Judges.

PER CURIAM:

Oral argument was held in this case on February 4, 2005. After careful consideration of the briefs on appeal, the proceedings below, and the arguments of counsel at oral argument, we conclude that the judgment of the district court is due to be affirmed. The crucial issues on

appeal were fully discussed at oral argument. We have carefully considered the comprehensive findings and conclusions of the bankruptcy court in its memorandum decision and order dated July 29, 2003, and the decision of the district court dated March 5, 2004, and we conclude that there has been no reversible error in the instant case.

AFFIRMED.

United States Court of Appeals
For the Eleventh Circuit

No. 04-11301

District Court Docket Nos.
03-80859-CV-KLR,
01-33622-BKC-PG

In Re: U.S. Pool Corp.,

Debtor.

MICHAEL E. GREENE,
MICHAEL E. GREENE, P.A.,

Plaintiff-Appellant,

versus

BERGER SINGERMAN, P.A.,
MHR INSTITUTIONAL PARTNERS LP,
MHR CAPITAL PARTNERS LP,
MHRM PARTNERS LP,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

(Filed Feb. 11, 2005)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: February 11, 2005
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 03-80859-CIV-RYSKAMP

MICHAEL E. GREENE and
MICHAEL E. GREENE, P.A.,

Appellants,

v. [CLOSED CASE]

BERGER SINGERMAN, P.A.,

Appellees.
_____/

ORDER AFFIRMING JULY 29, 2003 MEMORANDUM DECISION AND ORDER IMPOSING SANCTIONS AGAINST MICHAEL E. GREENE, ESQ. AND MICHAEL E. GREENE, P.A.

[Filed Mar. 5, 2004]

THIS CAUSE conies before this Court pursuant to Appellants Michael E. Greene, Esq. and Michael E. Greene. P.A.'s (collectively, "Greene") Notice of Appeal from the Bankruptcy Court's July 29, 2003 Memorandum Decision and Order Imposing Sanctions Against Michael E. Greene, Esq. and Michael E. Greene, P.A., filed August 8, 2003. Greene filed an initial brief on November 10, 2003 **[DE 24]**. Appellees U.S. Pool Corp. ("USP"), MHR Institutional Partners, LP, MHR Capital Partners, LP, MHRM Partners, LP ("MHR"), U.S. Pool Acquisition Corp. ("USPAC"), and Berger Singerman, P.A. ("BSPA") filed an answer brief on December 19, 2003 **[DE 30]**. Greene filed a reply brief on January 9, 2004 **[DE 33]**. The Court is familiar with the record in this case and has determined that oral argument is unnecessary for adjudication of this appeal. This matter is therefore ripe for review.

I. BACKGROUND

On July 10, 2001, USP filed a voluntary Chapter 11 bankruptcy case. USP soon moved to sell substantially all its assets, specifying that its secured lender, MHR, which had a $3 million debt secured by a lien on USP's assets under a Note Purchase Agreement ("NPA") between MHR and USP, would be allowed to credit bid at the sale. On August 27, 2001, MHR was approved as the successful bidder. Although Leasing Associates, Inc. ("LAI") had notice of the sale hearing and bidding procedures, it elected not to appear at the hearing.

On September 14, 2001, LAI moved pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to modify the August 27, 2001 sale order on grounds of excusable neglect so that it could assert alleged subordination rights against MHR. The same day, LAI filed a complaint to enforce the alleged subordination agreement by MHR in the NPA. LAI claimed it was entitled to relief from the sale order due to alleged misrepresentations by USP's counsel to LAI's counsel prior to the sale hearing regarding the existence of a subordination agreement in favor of LAI. The Rule 60(b) motion was denied based upon a finding that LAI's failure to oppose the sale order was the result of a deliberate decision rather than excusable neglect. LAI's motion for reconsideration was also denied.

LAI continued to prosecute the adversary proceeding, amending its Complaint to assert claims for equitable subordination, breach of fiduciary duty, and misrepresentation based on the allegation that USP's counsel, BSPA, misled LAI regarding its subordination rights prior to August 27, 2001. MHR promptly moved for summary judgment on all counts. LAI next moved for leave for

further amendment of its Complaint to assert claims against BSPA for breach of fiduciary duty and misrepresentation. Shortly thereafter, BSPA and MHR served motions for sanctions on LAI and Greene pursuant to the "safe-harbor" provision of Rule 9011 of the Federal Rules of Bankruptcy Procedure. LAI temporarily withdrew its request to amend, but soon filed a slightly revised version of the same motion. BSPA and MHR then filed their sanctions motions with the Bankruptcy Court.

On June 17, 2002, the Bankruptcy Court granted MHR's motion for summary judgment and denied LAI's request to assert claims against BSPA. LAI appealed the summary judgment order to this Court. On November 20, 2002, this Court affirmed the Bankruptcy Court's summary judgment order in all respects.[1]

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[1] On December 5, 2002, USP, MHR and USPAC filed motions with this Court for appellate costs and attorneys' fees pursuant to 28 U.S.C. § 1927 and Rule 8020 of the Federal Rules of Bankruptcy Procedure. This Court found that the appeal of the June 17, 2002 order was frivolous, and granted the motions for fees and costs. This Court remanded the issue of setting the amount of the sanctions award to the Bankruptcy Court. On March 27, 2003, the Bankruptcy Court imposed sanctions against Greene in the amount of $35,519.00 in fees and $10,700.30 in single costs for MHR, and $41,625.00 in fees and $4,988.48 in single costs for BSPA. On July 25, 2003, this Court entered a final judgment thereon, but reduced the amount of the sanctions award to $10,000.00 based on Greene's financial circumstances. This Court ordered Greene to pay the $10,000.00 to the Clerk of Court, as it found that MHR and BSPA had been made whole in that they received more that twice their appellate costs and fees as a result of the settlement. Appellees requested clarification of the Final Judgment, stating that the $250,000.00 settlement was not solely attributable to appellate fees and costs, but was also attributable to fees and costs incurred in defending LAI's actions in the Bankruptcy Court. Appellees noted that their combined fees and costs exceeded $250,000.00. Consequently, on September 17, 2003, this Court issued an order to clarify that Appellees

(Continued on following page)

The Bankruptcy Court set a hearing on the sanctions motions for February 14, 2003. Prior to the hearing, MHR and BSPA reached a settlement with LAI and Greene's co-counsel, Edward Rothberg, Esq., pursuant to which LAI and Rothberg agreed, *inter cilia*, to pay $250,000.00 to MHR and BSPA and to dismiss all claims against said entities.

On July 29, 2003, the Bankruptcy Court issued the sanctions order currently on appeal. The Bankruptcy Court concluded that Greene violated Rule 9011 in a variety of ways throughout the adversary proceeding, that he unreasonably and vexatiously multiplied the proceedings by filing and pursuing LAI's claims, and that his actions were taken in bad faith, wantonly, and for oppressive reasons. The Bankruptcy Court imposed sanctions pursuant to Rule 9011, 28 U.S.C. § 1927, and its inherent power.

As a result of the allocation of settlement proceeds Appellees received from LAI and Rothberg, the Bankruptcy Court found that MHR's fees and costs in the adversary proceeding had been satisfied from the settlement funds, and accordingly awarded no monetary sanction against Greene for MHR's fees and costs. The Court ruled that BSPA could not recover fees under Rule 9011 or 28 U.S.C. § 1927, but was eligible for an award of costs under said provisions. After considering Greene's financial circumstances, the Bankruptcy Court awarded sanctions

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had not been made whole as to Greene's conduct in the combined proceedings. As a result, the Court ordered Greene to pay the sanction to BSPA and MHR.

of $40,000.00 to BSPA, an amount significantly less than BSPA's total fees and costs.

II. STANDARD OF REVIEW

This Court reviews the imposition of sanctions against Greene in the July 29, 2003 Order for abuse of discretion. *See In re Mroz*, 65 F.3d 1567, 1571 (11th Cir. 1995). "An abuse of discretion occurs if the trial court failed to apply the proper legal standard of [sic] failed to follow proper procedures in making its determination. . . . " *See Boyes v. Shell Oil Products Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000) (quotation omitted). The Bankruptcy Court's factual findings are reviewed for clear error. Fed.R.Bnkr.P. 8013. A finding of fact is clearly erroneous when a reviewing court is left with a firm and definite conviction that a mistake has been committed.

See United States v. United States Gypsm Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542 (1948). "The test for the [appellate] court . . . is not whether a different conclusion from the evidence would be appropriate, but whether there is sufficient evidence in the record to prevent clear error in the trial judge's findings." *In re Bardwell*, 610 F.2d 228, 230 (5th Cir. 1980).

III. DISCUSSION

The Court will not reiterate the facts of the underlying dispute for purposes of reviewing the July 29, 2003 sanctions order. The Bankruptcy Court has already recited the facts of the underlying dispute in its June 17, 2002 summary judgment order and the order currently on appeal. Furthermore, in its July 25, 2003 Final Judgment

for appellate sanctions, this Court already detailed the factual underpinnings of this dispute.

The Bankruptcy Court sanctioned Greene on a number of bases, all of which are valid. The Court will examine each of them in turn.

1. The NPA and the "No Third Party Beneficiaries" Provision

Throughout the course of these proceedings, LAI has maintained that the Sale Order's Note Purchase Agreement ("NPA") allowed it to bring claims against MHR under a "subordination agreement." It is undisputed that a subordination agreement between MHR and LAI never existed, however. Furthermore, a "no third party beneficiaries" clause exists in the NPA that specifically disclaims any intent to create any rights enforceable by non-parties. The Bankruptcy Court's sanctions order fully develops the relevant caselaw and establishes beyond doubt that Greene's claims are baseless. Indeed, this Court has already ruled that Greene's appeal of the summary judgment order was frivolous. Greene has failed to demonstrate that the Bankruptcy Court abused its discretion in imposing sanctions for his advocating that the NPA allowed him to challenge the sale order.

2. Subordination of LAI's Rights as a Secured Creditor

The Bankruptcy Court ruled that even if the NPA granted LAI subordination rights, the rights would be inapplicable to MHR's rights as a secured creditor. The NPA specifically provided that "no lessor shall have rights of a secured creditor." The Bankruptcy Court also provided

a detailed discussion of *Allegaert v. Chemical Bank*, 657 F.2d 495 (2d Cir. 1980), which held that the holder of a perfected security interest had the right to receive the proceeds of its collateral in spite of a subordination agreement. The Bankruptcy Court also explained how Greene's citations to and interpretation of *Allegaert* were misleading. Greene's defense to the imposition of sanctions amounts to nothing more than a rearguing of *Allegaert*. Imposition of sanctions for Greene's mischaracterization of *Allegaert* and other cases relating to a perfected security interest's superiority to a subordination agreement was proper.

3. Preclusive Effect of Sale Order

The Bankruptcy Court held that the sale order, which found that the sale agreement was entered into in good faith and that the sale was open, fair and reasonable, precluded LAI's claims in the adversary proceeding and sanctioned Greene for effectively making a collateral attack on the sale order. Greene does not dispute the caselaw the Bankruptcy Court cites in support of its decision to impose sanctions for challenging the sale order. This Court finds no error in the Bankruptcy Court's determination that LAI brought a collateral attack on the sale order.

4. Unsupported Factual Assertions

The Bankruptcy Court noted that a number of LAI's factual assertions did not satisfy Rule 9011, which requires that such allegations "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further

investigation or discovery." First, LAI claimed that it did not object to the sale motion because Rothberg had no documents to support its subordination rights and because LAI Vice President of Credit, Ron Janak, was unable to give Rothberg specific information about the NPA as of early August 2001. The Bankruptcy Court found that LAI's files always contained sufficient information to identify the NPA and the specific language on which LAI supposedly relied. Furthermore, the Bankruptcy Court found that Greene never asked LAI to search its files to find such information prior to representing to the Bankruptcy Court that LAI was unable to obtain such information. Second, LAI repeatedly alleged that MHR effectively controlled USP. This allegation was significant because LAI maintained that USP, through BSPA, attempted to interfere with LAI's exercise of its alleged subordination rights. Greene claimed that a search of Florida corporate public records supported his claim, but public records indicate that Mark Rachesky, a principal of MHR, was not the sole principal of USP when USP filed its Chapter 11 case. Nevertheless, LAI still insisted that MHR had "hand picked" USP's new CEO, Rick Andron. The Bankruptcy Court found that a USP shareholder, not MHR, initially solicited Andron for the position and that Greene did not point to any other connections between Andron and MHR indicating that MHR controlled USP. This Court finds no error in the Bankruptcy Court's imposition of sanctions for Greene's failure to comply with Rule 9011.

5. Motion to Join BSPA

The Bankruptcy Court sanctioned Greene pursuant to Rule 9011 for attempting to name BSPA as a party defendant. In its summary judgment order, the Bankruptcy

Court ruled that, since LAI had no subordination rights to begin with, BSPA could do nothing to impair said rights. In the sanctions proceedings, the Bankruptcy Court ruled that LAI's allegations against BSPA were factually and legally meritless. The Bankruptcy Court ruled that BSPA's statement that it did not know the document existed was accurate because a draft subordination agreement was destroyed prior to USP's Chapter 11 filing and was never presented to MHR. The Bankruptcy Court also rejected LAI's argument that BSPA backdated a supplement to the NPA that lacked a subordination provision, as the record reflected that a BSPA associate emailed the supplement some time after it was actually drafted. Additionally, LAI passed on the opportunity to review the document containing its alleged subordination rights by appearing at either of two hearings at which BSPA distributed the document to all in attendance or by requesting the document from the Clerk of the Bankruptcy Court. The Bankruptcy Court found that LAI's breach of fiduciary duty allegation against BSPA was legally flawed in that BSPA owed LAI no duty. *See In re ICM Notes, Inc.*, 278 B.R. 117, 123 (S.D. Tex. 2002). Even if BSPA owed LAI a fiduciary duty, however, the facts do not support such a claim. Finally, the Bankruptcy Court noted that LAI's allegations of wrongdoing directed toward BSPA were collateral attacks on its non-appealable orders rejecting LAI's arguments in that regard. The Court sees no error in the imposition of sanctions for the attempt to add BSPA as a defendant.

6. Due Process

Greene argues that imposition of sanctions violates Due Process because (1) MHR's Rule 9011 sanctions motion did not give adequate notice of the basis of its

sanctions request, and (2) because BSPA's sanctions motion referred to another document, BSPA's opposition to the motion to further amend. MHR's sanctions motion stated its position that it was not particular statements that violated Rule 9011, but LAI's continued prosecution of the action. The motion explained why each of LAI's causes of action lacked legal and/or factual grounds. Greene's arguments as to BSPA are irrelevant because BSPA did not receive a Rule 9011 sanctions award. Rather, the sanctions award as to BSPA issued pursuant to the Bankruptcy Court's inherent power. At any rate, Greene received BSPA's memorandum of law in opposition to LAI's motion to further amend. Greene had adequate notice that he could be sanctioned if he continued to prosecute this action.

7. Amount of Sanctions Award

The Bankruptcy Court found, and Greene does not dispute on appeal, that MHR and BSPA collectively incurred more than $300,000.00 in fees and costs in the defense of this action. The Bankruptcy Court considered Greene's financial condition and reduced the sanctions award to $40,000.00, exclusive of the $10,000.00 imposed by this Court. Greene objects to the amount of the sanctions award on the grounds that the Bankruptcy Court based it on what Greene was able to borrow rather than on what Greene actually had. The Court sees no error in the amount of the sanction imposed by the Bankruptcy Court. The Bankruptcy Court specifically found that, within 30 days of this Court's order imposing Rule 8020 sanctions, Greene took a $43,000.00 cash advance on a credit card that he used to pay down a mortgage on his house and transferred title to a car worth $15,000.00 to $20,000.00 to

his wife. Significantly, after making these transactions, Greene posted cash bonds of 110% percent of the total amount of the sanctions imposed on him by this Court and the Bankruptcy Court, thereby evidencing his ability to pay the sanctions. Furthermore, there is no violation of the "one-payment rule," as the $250,000.00 settlement did not make Appellees whole.

8. Award of Sanctions to BSPA Pursuant to the Court's Inherent Power

Greene also claims that the award of sanctions to BSPA, which was proceeding pro se, was an abuse of discretion on the theory that violations of Rule 9011 do not support an award of sanctions pursuant to the Bankruptcy Court's inherent power. The Bankruptcy Court accurately cited Supreme Court and Eleventh Circuit caselaw regarding inherent powers sanctions, and found such an award appropriate in this case. *See e.g., Thomas v. Tenneco Packaging Co., Inc.*, 293 F.3d 1306, 1320 (11th Cir. 2002) (the "'inherent power' to sanction errant lawyers, in fact, 'can be invoked even if procedural rules exist which sanction the same conduct.") (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50, 111 S.Ct. 2123, 2135 (1991)). In light of the voluminous evidence before the Bankruptcy Court, this ruling was not clearly erroneous.

IV. CONCLUSION

THE COURT being fully advised and having considered the pertinent portions of the record, hereby

ORDERS AND ADJUDGES that the July 29, 2003 Memorandum Decision and Order Imposing Sanctions Against Michael E. Greene, Esq. and Michael E. Greene is

AFFIRMED IN ITS ENTIRETY. The Clerk of Court shall close this case and deny any pending motions as moot.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 5 day of March, 2004.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES
DISTRICT JUDGE

Copies provided:
Counsel of Record

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:	**CASE NO.:**
U.S. Pool Corp.,	**01-33622-BKC-PGH**
Debtor. /	**CHAPTER 7**
Leasing Associates, Inc., a/k/a LAI Trust,	
Plaintiff,	**ADV. NO.:**
v.	**01-3196-BKC-PGH-A**
U.S. Pool Corp., et al.,	
Defendants. /	

FINAL JUDGMENT

On February 14, 2003, the Court conducted an evidentiary hearing on *MHR's Motion for Sanctions Pursuant to Fed.R.Bankr.P. 9011 Against LAI and its Counsel*, and *Berger Singerman's Motion for Sanctions Against LAI's Counsel.* The Motions were filed by MHR Institutional Partners LP, MHR Capital Partners LP, MHRM Partners LP and U.S. Pool Acquisition Corp. (collectively "MHR"), which were defendants in the underlying adversary proceeding filed by Leasing Associates, Inc. ("LAI"), and by Berger Singerman, P.A. ("BSPA"), which was counsel to defendant and debtor U.S. Pool Corp. ("US Pool"), as well as the respondent in LAI's Motion to Further Amend (as defined herein) its Amended Complaint to add BSPA as a party defendant.

In accordance with Federal Rule of Bankruptcy Procedure 9021 and this Court's *Memorandum Decision and Order Imposing Sanctions Against Michael E. Greene, Esq., and Michael E. Greene, P.A.*, entered contemporaneously herewith, it is hereby:

ORDERED AND ADJUDGED that Michael E. Greene, Esq. And Michael E. Greene, P.A., shall be jointly and severally liable to pay sanctions in the amount of $40,000.00 to Berger Singerman, P.A. within thirty days from the date of this order for which let execution issue. Interest will begin to accrue at the federal rate thirty days from the date of this order.

DONE AND ORDERED in Fort Lauderdale, Florida, this 29th day of July, 2003.

/s/ Paul Hyman
PAUL G. HYMAN, JR Judge
United States Bankruptcy Court

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AUST

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:	CASE NO. 01-33622-BKC-PGH
U.S. POOL. CORP., Debtor.	CHAPTER 7
_____/	
LEASING ASSOCIATES, INC. a/k/a LAI TRUST, Plaintiff,	ADV. NO. 01-3196-BKC-PGH-A
vs.	
U.S. POOL CORP., et al., Defendants.	
_____/	

MEMORANDUM DECISION AND ORDER IMPOSING SANCTIONS AGAINST MICHAEL E. GREENE, ESQ. AND MICHAEL E. GREENE, P.A.

On February 14, 2003, the Court conducted an evidentiary hearing on *MHR's Motion for Sanctions Pursuant to Fed.R.Bankr.P. 9011 Against LAI and its Counsel, and Berger Singerman's Motion for Sanctions Against LAI's Counsel*. The Motions were filed by MHR Institutional Partners LP, MHR Capital Partners LP, MHRM Partners LP and U.S. Pool Acquisition Corp. (collectively "MHR"), which were defendants in the underlying adversary proceeding filed by Leasing Associates, Inc. ("LAI"), and by Berger Singerman, P.A. ("BSPA"), which was counsel to defendant and debtor U.S. Pool Corp. ("US Pool"), as well as the respondent in LAI's Motion to Further Amend (as defined herein) its Amended Complaint to add BSPA as a party defendant to allege that BSPA made misrepresentations and breached a fiduciary duty owed to LAI. The

Motions seek sanctions under Fed.R.Bankr.P. 9011, 28 U.S.C. § 1927, and the Court's inherent powers,[1] against Michael E. Greene, Esq. and Michael E. Greene, P.A. ("Greene"), who represented LAI, for his filing and continued prosecution of this action.

This Order addresses only the sanctions sought against Greene. At the February 14, 2003 hearing, MHR and BSPA announced that they had reached a settlement with LAI, as well as with Mr. Greene's co-counsel, Edward Rothberg, Esq., and Mr. Rothberg's firm, Weycer Kaplan Pulaski & Zuber, P.C., against whom relief was also sought. The Court entered an Order dated February 14, 2003 approving the parties' settlement. The settlement agreement provided for payment of $250,000.00 to MHR and BSPA with the settlement proceeds to be allocated as MHR and BSPA determine in their sole discretion. Notwithstanding the settlement agreement, because MHR and BSPA seek relief pursuant to an exercise of this Court's inherent powers, the Court must ensure that the settlement proceeds are equitably allocated in a manner that fairly credits Geene for funds received pursuant to the settlement agreement. To that end on May 20, 2003, the Court entered an *Order Determining that the Court Can Not Adjudicate MHR's and Berger Singerman's Motions for Sanctions Against Michael E Green Esq and Michael E Green PA Until the Settlement Proceeds are Allocated*. MHR and BSPA filed a Motion for Approval of

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[1] BPSA's Motion for Sanctions sought sanctions only pursuant to Fed.R.Bankr.P.9011. BSPA subsequently filed a supplement to its motion seeking sanctions pursuant to 28 U.S.C. § 1927 and the Court's inherent authority to control its docket based upon the same conduct discussed in BPSA's original motion.

Allocation of Settlement Proceeds (the "Allocation Motion") on June 2, 2003. Greene filed a Supplemental Declaration of Interested Party Green In Support of His Opposition to Sanctions Motions on June 13, 2003, and a Memorandum of Law Opposing Motion for Approval of Allocation Settlement on June 18, 2003. The Allocation Motion was heard by the Court on June 20, 2003.

The Court has reviewed the entire record in this action, including the proceedings in the main bankruptcy case as well as proceedings on appeal which have been brought to the Court's attention, has considered the exhibits and testimony presented by the parties at a full day evidentiary hearing conducted on February 14, 2003, including an assessment of the demeanor, candor and credibility of the witnesses, and has considered relevant authorities. After due consideration, the Court finds that in the course of this adversary proceeding Greene has committed multiple violations of the requirements of Rule 9011.[2] The Court further finds that in filing and pursuing these claims Greene has unreasonably and vexatiously multiplied the proceedings in this case. The Court finds that sanctions are appropriate and warranted under Fed.R.Bankr.P. 9011, 28 U.S.C. § 1927, and the Court's inherent power, for the fees and costs reasonably incurred by MHR, and under the Court's inherent powers for the some [sic] of the fees and costs reasonably absorbed by BSPA in the defense of this action.

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[2] Each of the pleadings or other papers filed by LAI as described herein were signed by Mr. Greene as counsel for LAI. The Court's references to pleadings filed and arguments advanced by LAI, refer to conduct of Mr. Greene.

BACKGROUND

The procedural history of this action is detailed in the Court's June 17, 2002, *Memorandum Decision and Order Granting MHR's Motion for Summary Judgment on Amended Complaint, Denying LAI's Cross-Motion for Summary* (the "Memorandum Decision"), and need not be repeated in its entirety here. The Court will however update those matters which post-date the Memorandum Decision.

On July 10, 2001, US Pool filed a voluntary Chapter 11 petition. US Pool gave notice of its intention to do a sale of its assets as a going concern through the Bankruptcy Court pursuant to 11 U.S.C. § 363 by filing both a motion to approve bidding procedures and a motion to approve sale. Those motions and other "first-day" filings including a motion to approve postpetition financing and use of cash collateral, gave clear notice that US Pool's lender, MHR, held a perfected lien on substantially all of US Pool's assets securing a debt of approximately $3 million, and that MHR would be permitted to credit bid at the sale. It is undisputed that LAI received notice of all the foregoing motions and the hearings thereon, and raised no objection to the bidding procedures. LAI elected not to appear at, or object to, the August 22, 2001 sale hearing at which MHR (through its assignee, U.S. Pool Acquisition Corp.) was approved as the successful bidder for US Pool's assets with a $750,000 credit bid. An order approving the sale was entered August 27, 2001 (the "Sale Order"). The Sale Order made express findings that the MHR bid was made in good faith, that the sale process was conducted in a manner which was fair, open and reasonable, that the agreement for the purchase was negotiated in good faith and without collusion, that pursuant to 11 U.S.C. §363(f)

the assets would be transferred to MHR free and clear of all liens, claims, encumbrances and interests of every kind and nature, and that all entities holding claims against US Pool would be barred from asserting such claims of any kind and nature against MHR or the purchased assets.

On September 14, 2001, eighteen days after the Sale Order was entered, LAI filed a *Complaint to Enforce Subordination Agreement* ("Complaint") commencing this adversary proceeding against US Pool and MHR. Simultaneously, LAI filed a motion to modify the Sale Order under Fed.R.Civ.P. 60(b) (the "Rule 60(b) Motion") in the main case, seeking relief from the Sale Order in order to assert its alleged contractual subordination claim against MHR. Both pleadings were signed by Mr. Greene.[3] The Complaint and Rule 60(b) Motion contended that LAI held contractual subordination rights against MHR under the Note Purchase Agreement (the "NPA") between MHR and US Pool, and sought to assert such rights notwithstanding the entry of the Sale Order. LAI, however, was not a party to the NPA.

An evidentiary hearing on the Rule 60(b) Motion was held on October 12, 2001, after which the Court found that LAI's failure to timely oppose the entry of the Sale Order was the result of a conscious decision rather than any excusable neglect. Accordingly, the Court denied the relief requested by LAI. LAI filed a motion for reconsideration (the "Motion for Reconsideration") in which LAI reiterated the argument it made at the October 12 hearing, which

[3] All pleadings filed on behalf of LAI were signed by Mr. Greene with the exception of some pleadings filed by LAI's substitute counsel shortly before the sanctions hearing.

was that LAI was entitled to relief because of alleged misrepresentations made by BSPA, US Pool's counsel, in connection with LAI's counsel's inquiry regarding documents to support its alleged subordination rights. At the October 19, 2001 hearing, the Court announced its finding that "there was no evidence of any conspiracy between the creditor and the debtor" and that "there was no fraud". An order denying LAI's Motion for Reconsideration was entered October 23, 2001.

LAI appealed the denial of the Rule 60(b) Motion and Motion for Reconsideration to the District Court. On December 17, 2001, the same day it conducted oral argument, the District Court entered an order affirming this Court's decision. LAI appealed to the Eleventh Circuit Court of Appeals, but abandoned that appeal after the Eleventh Circuit denied LAI's request for a stay pending appeal. The sale to MHR was subsequently consummated.

Meanwhile LAI, through Greene as counsel, continued with the prosecution of this adversary proceeding. On November 5, 2001, LAI moved to amend its Complaint to assert additional claims against US Pool and MHR for equitable subordination, breach of fiduciary duty and misrepresentation. The Amended Complaint, which alleged that US Pool's counsel had misled LAI with respect to LAI's supposed subordination rights in connection with the sale proceeding and with respect to MHR's supposed control over US Pool, was filed November 30, 2001. On December 10, 2001, MHR filed its *Motion for Summary Judgment on Amended Complaint* (the "Summary Judgment Motion"). After responding pursuant to a Court-ordered briefing schedule, LAI requested and was granted the opportunity to conduct additional discovery and to

submit additional briefs and papers on the issues raised by the Summary Judgment Motion.

On March 5, 2002, shortly before a pretrial conference, LAI filed a motion to further amend its Amended Complaint, seeking leave to join BSPA – counsel for US Pool – as a party defendant to its claims for breach of fiduciary duty and misrepresentation (the "Motion to Further Amend"). BSPA filed a response in opposition to the Motion to Further Amend and simultaneously served on LAI's counsel a Rule 9011 "safe-harbor" letter and *Motion for Sanctions Against LAI's Counsel*. The Court then entered an Order authorizing BSPA to file its sanctions motion without submitting a second "safe-harbor" letter in the event LAI refiled the Motion to Further Amend. LAI withdrew the Motion to Further Amend in the face of the "safe-harbor" letter, but renewed the motion on April 3, 2002. BSPA accordingly filed its motion for sanctions on May 15, 2002.

MHR served its *Motion for Sanctions Pursuant to Fed.R.Bankr.P. 9011 Against LAI and its Counsel* on April 24, 2002, and then filed the motion on May 16, 2002 after LAI failed to withdraw its Amended Complaint and opposition to the Summary Judgment Motion within the "safe harbor" period provided by Fed.R.Bankr.P. 9011(c)(1)(A).

On June 17, 2002, the Court entered its Memorandum Decision which granted summary judgment in favor of MHR and against LAI on all counts of the Amended Complaint, and denied as futile LAI's Motion to Further Amend seeking to add BSPA as a party defendant. In the Memorandum Decision, the Court reserved jurisdiction to determine the pending sanctions motions of MHR and BSPA. The Court, at LAI's request, deferred a hearing on

the sanctions motions while LAI pursued an appeal to the District Court. On November 20, 2002, the District Court entered a written order affirming this Court's Memorandum Decision in full.[4]

Both MHR and BSPA filed motions for sanctions in the District Court pursuant to Fed.R.Bankr.P. 8020 and 28 U.S.C. § 1927 for LAI's pursuit of a frivolous appeal of the Memorandum Decision, and on December 20, 2002 the District Court entered a *Combined Order Granting Appellees' Motions for Costs and Damages and Denying Appellant's Motion for Extension of Time to File Appeal* (the "Sanctions Order") which found that the appeal was "without merit and frivolous," granted MHR's and BSPA's requests for an award of their attorneys' fees and costs in the appeal against LAI and its counsel, and remanded to this Court for a determination of the amount. The amount of the fees and costs to be awarded pursuant to the District Court's Sanctions Order have been determined by this Court's March 27, 2003 *Order Determining Amount Pursuant to District Court's Combined Order Granting Appellees' Motions for Costs and Damages* (the "Appeal Sanctions Amount Order"). On July 25, 2003, the District Court entered a Final Judgment imposing sanctions in connection with the district court appeal against Greene in the amount of $10,000.00.

As discussed above, MHR's and BSPA's claims against LAI and Greene's co-counsel were resolved by settlement, leaving for adjudication only the claims against Greene.

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[4] LAI, through Greene, filed a further appeal to the Eleventh Circuit Court of Appeals but withdrew the appeal after obtaining substitute counsel and reaching a settlement with MHR and BSPA in respect of the sanctions matters.

THE ISSUES

In MHR's *Motion for Sanctions* and July 3, 2002 *Supplement to Motion for Sanctions Pursuant to Fed.R.Bankr.P. 9011 Against LAI and its Counsel*, MHR identifies general, fundamental flaws in the claims asserted by LAI, as well as specific arguments and representations which MHR claimed had no basis in law or fact, were inaccurate, or misleading. The primary focus of MHR's motion was:

- LAI's assertion, as a non-party, of subordination rights under the NPA between MHR and US Pool notwithstanding a "No Third Party Beneficiaries" clause which is enforceable and controlling under applicable law;
- LAI's assertion of subordination rights in connection with MHR's exercise of its remedies as a secured creditor of US Pool notwithstanding language in the provision in the NPA relied on by LAI that "no lessor shall have rights of a secured creditor," and applicable law providing that a subordination does not affect a secured creditor's rights with respect to its collateral;
- LAI's assertion against MHR of any claims for the obligations owed to it by US Pool as a result of the sale, notwithstanding the preclusive effect of the Sale Order with respect to such claims; and
- LAI's assertion of certain factual claims that were unsupported by the evidence.

These arguments were advanced by Greene on behalf of LAI in the January 3, 2002, *Plaintiff LAI's Memorandum in Opposition to MHR's Motion for Summary Judgment and Judgment and Plaintiff LAI's Cross-Motion for*

Summary Judgment on Count I (the "Jan. 3rd Memorandum") and related pleadings, and the March 29, 2002 *Plaintiff's Supplement to Memorandum in Opposition to MHR's Motion for Summary Judgment* (the "March 29th Supplement").[5]

The merits of LAI's claims against MHR, and of its defenses to MHR's Summary Judgment Motion were discussed in, and resolved by, the Court's Memorandum Decision and that discussion need not be repeated here. Despite the Court's Memorandum Decision finding several of LAI's positions to be lacking in merit, Greene has repeated his arguments in defense of the sanctions motions[6] rather than attempting to demonstrate why, although rejected by the Court, the arguments nonetheless were made after reasonable investigation and were warranted by existing law or a non-frivolous argument for the extension, modification or reversal of existing law or the establishment of new law. The Court, having previously determined the issues, has not revisited the underlying merits re-argued by Greene, but instead has focused on

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[5] This Order does not address all of the instances in which the movants claim Greene engaged in sanctionable conduct as the violations identified herein provide a sufficient basis for the imposition of sanctions. An appropriate inquiry of the law and facts would have confirmed that LAI had no basis for filing suit against MHR, US Pool or BSPA. Its contractual subordination claim was barred by controlling law, its claims for equitable subordination, breach of fiduciary duty and misrepresentation all hinged on the supposed interference with its "alleged" contractual subordination rights. Notwithstanding the lack of basis for LAI's claims, these claims were precluded by the Sale Order which protected MHR from any claims of creditors of US Pool arising from the sale. LAI did not succeed in its attempt to modify the Sale Order.

[6] *See Plaintiff LAI's Opposition to Motion for Sanctions of MHR Under Rule 9011* (the "Opposition").

the evidence of Greene's compliance with his duties under Rule 9011 and section 1927, and the Court's authority to control its docket to achieve the orderly and expeditious disposition of cases before it in determining whether sanctions are appropriate.

In BSPA's *Motion for Sanctions Against LAI and its Counsel*, BSPA asserted that the filing of LAI's Motion to Further Amend its Amended Complaint to add BSPA as a party defendant, which included a proposed second amended complaint, violated Fed.R.Bankr.P. 9011(b) because the allegations contained therein were without merit, factually and legally, and were presented to the Court for improper purposes. The crux of the allegations against BSPA were its alleged misrepresentations and breaches of fiduciary duty vis-a-vis LAI in the course of BSPA's representation of US Pool during the pendency of its chapter 11 case. In the Memorandum Decision, the Court declined to further address these allegations based upon the doctrine of futility of amendment set forth in *In re Holywell Corp.*, 177 B.R. 991, 998 (S.D. Fla. 1995), *aff'd without opinion*, 95 F.3d 57 (11th Cir. 1996). *Accord Rudolph v. Arthur Anderson & Co.*, 800 F.2d 1040, 1042 (11th Cir. 1986) (recognizing futility of amendment exception to Rule 15(a)). The Court will first address LAI's arguments and allegations as they relate to MHR, and then as they relate to BPSA.

THE EVIDENCE

At the February 14, 2003 hearing, MHR and BSPA moved into evidence forty-one exhibits, including multiple pleadings filed by LAI and signed by Greene in the adversary proceeding, the sanctions motions and responses

thereto, discovery responses of Greene relating to the sanctions issues, several pleadings, papers and orders from the District Court appeal of this Court's Memorandum Decision on summary judgment,[7] and documentation of the fees and costs incurred by MHR and BSPA in connection with the adversary proceeding. Greene moved fifteen exhibits into evidence.

The movants introduced the testimony of Deborah Menotte, the Chapter 7 Trustee for US Pool; Alvin Goldstein, an attorney who represented Leland Morris, the former president of US Pool and a shareholder of US Pool; and Ronald Janak, a vice president of LAI. Mr. Greene also testified in defense of the sanctions motions. The court finds that the testimony, taken as a whole, supports the imposition of sanctions against Greene pursuant to Fed.R.Bankr.P. 9011, 28 U.S.C. § 1927, and the Court's inherent authority to control its docket. At the start of the February 14, 2003 hearing, the Court granted BSPA's motion that in ruling on the sanctions motions, the Court consider the record in the main case. The Court has considered the record in the main case and the record in the above-captioned adversary proceeding in ruling on the

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[7] Greene repeatedly refers to the appellate brief he filed on behalf of LAI in his responses to interrogatories seeking evidence of his compliance with Rule 9011. Significant portions of his Opposition simply recite extensive, verbatim quotations from LAI's appellate brief. As noted above, the District Court found the appeal to be frivolous and the conduct of Greene and prosecution of the appeal sanctionable. While the District Court's finding of frivolousness and award of sanctions is not determinative of the Rule 9011 sanctions sought here, it is noteworthy that LAI's appellate briefs presumably contained Greene's strongest arguments, honed after a year of litigation. The District Court, however, found the appeal to be frivolous and without merit.

instant sanctions motions. *In re Lawrence*, 279 F.3d 1294, 1298 (11th Cir. 2002); *United States v. Rey*, 811 F.2d 1453, 1457 n.5 (11th Cir. 1987); *ITT Rayonier, Inc. v. United States*, 651 F.2d 343, 345 n.2 (5th Cir. Unit B 1981).

STANDARDS FOR IMPOSING SANCTIONS

Pursuant to Fed.R.Bankr.P. 9011, an attorney, by presenting a petition, pleading, written motion, or other paper, is certifying that:

> to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increases in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Fed.R.Bankr.P. 9011(b). If the Court determines that Rule 9011(b) has been violated, the Court may impose an

appropriate sanction upon the attorneys, law firms, or parties that have violated subsection (b) or are responsible for the violation. Fed.R.Bankr.P. 9011(c).

Rule 9011 is substantially similar to Fed.R.Civ.P. 11 and the case law interpreting Fed.R.Civ.P. 11 is often used in applying Rule 9011. *See, e.g., In re Mroz*, 65 F.3d 1567, 1572 (11th Cir. 1995). Under Rule 9011 and Rule 11, sanctions may be imposed: (1) when a party files a pleading that has no reasonable factual basis; (2) when a party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; or (3) when a party files a pleading in bad faith or for an improper purpose. *Byrne v. Nezhat*, 261 F.3d 1075, 1115 (11th Cir. 2001). While subjective bad faith may justify sanctions, the determination of whether Rule 9011 is violated does not require bad faith, but is based on whether the claims are objectively frivolous, and whether the party making the claims should have been aware that the claims were frivolous. *Id.* at 1105; *Mroz*, 65 F.3d at 1573.

In addition, 28 U.S.C. § 1927 provides that any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct." Under its inherent powers, the Court also has the ability to sanction attorneys who act in bad faith, vexatiously, wantonly or for oppressive reasons. *Chambers v. Nasco, Inc.*, 501 U.S. 32, 45-46 (1991). The exercise of such powers by a Bankruptcy Court is consistent with the authority granted by 11 U.S.C. § 105 to "issue any order, process or judgment that is necessary or appropriate to

carry out the provisions of this title." *See, e.g., In re Jove Engineering, Inc.*, 92 F.3d 1539 (11th Cir. 1996).

SANCTIONS PURSUANT TO GREENE'S VIOLATIONS OF RULE 9011

The Court has considered the evidence presented and finds that it reflects multiple violations of Rule 9011 by Mr. Greene. Consistent with Fed.R.Bankr.P. 9011(c)(3), the Court gives the following description of the conduct determined to constitute a violation of the rule and the basis for sanctions.

1. The NPA and the "No Third Party Beneficiaries" Provision

It is undisputed that there was never a subordination agreement between MHR and LAI. Indeed, the evidence at the February 14, 2003 hearing reflected that LAI had requested that US Pool obtain MHR's execution of such a subordination agreement between MHR and LAI, but that US Pool refused to even present it to MHR and ripped it up. LAI's assertion of contractual subordination rights against MHR is based exclusively on provisions in the NPA between MHR and US Pool which referred to "Permitted Vehicle Leases." The NPA does however contain a provision which states:

> *No Third Party Beneficiaries.* Except with respect to **Section 7.3** (Indemnification) and **Article XI** (Expenses; Indemnity) hereof, this Agreement does not create, and shall not be construed as creating any rights enforceable by any Person not a party to this Agreement.

As noted in the Memorandum Decision, the NPA is governed by New York law, and New York law, consistent with basic principles of contract construction, requires that a contract be interpreted in a manner which gives meaning to all of its provisions. *Paine Webber Inc. v. Bybyk,* 81 F.3d 1193, 1199 (2d Cir. 1996). With respect to third-party beneficiary rights, New York law further requires the face of the agreement to be clear with respect to the parties' intent to permit enforcement by a third party. *Newman & Schwartz v. Asplundh Tree Expert Co.,* 102 F.3d 660, 663 (2d Cir. 1996). Moreover, New York and federal courts have specifically held that "no third party beneficiary" clauses such as those in the NPA are enforceable, "decisive," and "controlling" of the issue of third party beneficiary rights. *Nepco Forced Products, Inc. v. Cons. Edison Co. of New York, Inc.,* 99 A.D.2d 508, 470 N.Y.S.2d 680 (S.Ct. App. Div. N.Y. 1984); *Morse/Diesel, Inc. v. Helena Erectors, Inc.,* 859 F.2d 242, 249 (2d Cir. 1988).

As the Court noted in the Memorandum Decision LAI's counsel, Greene, never attempted to present any interpretation of the NPA that would have given LAI enforceable subordination rights, while also giving meaning to the "No Third Party Beneficiaries" provision. Rather, LAI argued that the Court should disregard the "No Third Party Beneficiaries" provision or find it unenforceable as a matter of public policy.[8] This was the only

[8] In the Jan. 3rd Memorandum signed by Mr. Greene, LAI argued that "New York courts would likely find that MHR's position that LAI cannot enforce the subordination rights explicitly provided to vehicle lessors by the NPA to be offensive to public policy, especially when the ambiguity is drafted by the junior creditor. *See Kalisch-Jarcho v. City of New York,* 58 N.W.2d 377, 385; 461 N.Y.S.2d 746 (1983)." Mr. Greene

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way that LAI could justify an interpretation of the "Permitted Vehicle Lease" provisions as creating rights enforceable by it as a non-party.

The Court rejected this argument in the Memorandum Decision, noting that under New York law such "no third party beneficiary" provisions are enforceable according to their terms, that "[t]here is no principle of contract construction, at least under New York law, which would permit the Court to simply disregard provisions of the contract," that the public policy issues addressed in the *Kalisch-Jarcho* case regarding exculpatory clauses purporting to excuse intentional wrongdoing "have absolutely nothing to do with" third party beneficiary clauses such as those in the NPA, and that LAI's argument that the New York courts would hold the provision void as against public policy was "entirely unfounded." None of the pleadings filed by Mr. Greene have provided any further support for this argument, or even identified a recognized "public policy" concern implicated by the application of the "No Third Party Beneficiaries" clause contained in the NPA.

The Court has reviewed the additional arguments and explanations offered by Mr. Greene with regard to LAI's position on the NPA and the "No Third Party Beneficiaries" clause, and finds nothing which establishes the objective reasonableness of the positions he advanced on behalf of LAI. To the contrary, the arguments and authorities fail under the scrutiny required by this sanctions proceeding.

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later purported to cure any potential violation of Rule 9011 by changing the "cite signal" from "*See*" to "*Cf.*".

For example, LAI claimed that *Nepco* was "an example of a line of cases where the court ostensibly relied on one catch-all clause in a contract as dispositive where the putative third party beneficiary had little or no chance to prevail regardless of the 'dispositive' clause."[9] The argument advanced by LAI that the "real crux" of these decisions was anything other than the third party disclaimer provision is unsupported by a reading of the cases.

In *Nepco* itself, the court said nothing with respect to its evaluation of the third party beneficiary claims other than the following:

> [T]he best evidence of whether contracting parties intended their contract to benefit third parties remains the language of the contract itself. . . . Where a provision exists in an agreement expressly negating an intent to permit enforcement by third parties, as exists in the agreement at bar, that provision is decisive.
>
> *Nepco,* 99A.D.2d at 508(citations omitted).

The court looked to the disclaimer and nothing else.

Likewise, in *Edward B. Fitzpatrick Jr. Constr. Corp. v. County of Suffolk,* 138 A.D.2d 446 (S.Ct. N.Y. 1988), the entirety of the court's commentary on the third party beneficiary claim was the following:

> Finally the plaintiff has interposed a cause of action asserting, *inter alia,* that it was an intended beneficiary of the various contracts entered into between the defendant County, Bowe Walsh and

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[9] This argument was repeated in LAIS' appellate brief filed with the District Court.

> Converse Ward. However, two of these contracts contain clauses to the effect that no third-party rights accrued therefrom. Where a provision in the contract expressly negates enforcement by third parties, that provision is controlling. *Id.* at 449-50.
>
> Again, the court did not look past the disclaimer.

Indeed, in *Rosier v. Brown,* 601 N.Y.S.2d 554 (City Ct. N.Y. 1993), despite the stated purpose of a contract between a landlord and a housing authority being to "assist the family to lease a decent, safe and sanitary dwelling unit from the owner," and despite the presumption that the contract was for the third party's benefit since the performance was to be made directly to the third party, the court, relying on *Nepco,* nonetheless found that the specific "no third party beneficiary" clause precluded enforcement by the tenant. *Id.* at 557.

LAI also cited to *Twin City Construction Co. of Fargo, N.D. v. ITT Industrial Credit Co.,* 358 N.W.2d 716 (Minn. Ct. App. 1984) and *Hossain v. Rauscher Pierce Refsnes, Inc.,* 46 F.Supp.2d 1164 (D. Kan. 1999) as support for disregarding the "No Third Party Beneficiaries" clause. The *Twin City* case makes no reference to New York law, and LAI made no argument that Minnesota law, like New York law, had any controlling precedent that third-party disclaimer clauses are enforceable and decisive. The opinion is thus of no persuasive value.

The *Hossain* case is also unpersuasive. *Hossain* involved a lawsuit by a securities customer against a clearing house based on the clearing agreement between the customer's broker and the clearing house. The court

therein distinguished the *Nepco* line of cases by identifying a specific public policy concern – a clearing broker's non-waivable duties to investors imposed by law which create a fiduciary relationship between the clearing broker and customer – while *Nepco* involved only private contractual relations. *Hossain,* 46 F.Supp. at 1167, 1169 ("*Nepco* can be distinguished from the present action. The landlord was under no duty imposed by law to provide utility service to its subtenants. The duty to provide utility service was a contractual one on the part of ConEd."). LAI did not, and could not, argue that MHR had any legal duty to subordinate its claim to LAI. Accordingly, there was no reasonable basis for arguing that *Hossain* provided any support for disregarding the "No Third Party Beneficiaries" clause in the NPA.

Perhaps even more significant is that subsequent published decisions in the *Hossain* case reflect that the court ultimately receded from the "public policy" ruling relied on by LAI, and ultimately granted judgment to the defendant on the third party beneficiary claim, relying in part on the third-party disclaimer. *Hossain v. Rauscher Pierce Refsnes, Inc.,* 97 F.Supp.2d 1237 (D. Kan. 2000), *aff'd,* 15 Fed.Appx. 745, 2001 WL 876392 (10th Cir. 2001). In affirming, the Tenth Circuit referred to the "express contractual disclaimer of such an intent" to benefit third parties. *Hossain,* 15 Fed.Appx. at 749, 2001 WL 876392, *3. By failing to even address the important subsequent history of the case, LAI's arguments were not only inaccurate – they were misleading.

Mr. Greene's attempt to avoid the dispositive impact of controlling New York law on the enforceability of "no third party beneficiary clauses" by citing to clearly irrelevant or distinguishable authorities was objectively

unreasonable and warrants sanctions. *Compare Bonfiglio v. Nugent,* 986 F.2d 1391, 1393 (11th Cir. 1993) ("[Plaintiff's] reliance on a distinguishable, non-binding district court decision . . . for his position demonstrates how devoid of merit that position is.").

2. *Subordination of LAI's Rights as a Secured Creditor*

Based upon the plain language of the NPA and controlling Second Circuit authority, the Memorandum Decision determined that even if the NPA created enforceable subordination rights in favor of LAI, such rights would not apply to MHR's exercise of its remedies as a secured creditor, including its right to credit bid at a sale of its collateral. The Court noted that the "Permitted Vehicle Lease" definition relied on by LAI specifically stated that "no lessor shall have rights of a secured creditor," and moreover under New York law as determined by the Second Circuit Court of Appeal, the effect of a perfected security interest is superior to a subordination agreement such that a creditor still had the right to receive the proceeds of its collateral without regard to a subordination. *Allegaert v. Chemical Bank,* 657 F.2d 495 (2d Cir. 1980).

The Court's Memorandum Decision further noted that "LAI's attempts to distinguish the *Allegaert* decision have instead simply misrepresented its facts." LAI's first attempt to distinguish *Allegaert* in its Jan. 3rd Memorandum mischaracterized the case wherein it stated:

> MHR also contends that its perfected security interest in the Debtor's assets "trumps" LAI's senior status under the subordination provisions in the NPA. MHR relies for its contention upon

> *Allegaert v. Chemical Bank,* 657 F.2d 495 (2d Cir. 1980). In that case Chemical Bank had two irons in the fire – it held both a security interest in assets of the Debtor and was also a senior creditor due to a subordinated loan agreement. The trustee sought to avoid a payment received by Chemical Bank prior to the filing of the petition, and the issue of when Chemical Bank received payment from the Debtor turned on which iron provoked the payment. The Court held that the security interest was paramount as compared to the subordination agreement. *Id.* at 508 ("[T]he operation of the security interest, not the subordination clause, . . . must be taken into account when determining the time and the nature of the transfer to Chemical Bank"). It is not clear how *Allegaert* has any impact on this case, where MHR had agreed in the NPA to subordinate its secured-creditor status to that of LAI. However, the *Allegaert* Court does point out that parties to a contract usually do not negotiate absurd results. *Id.* at 509 n.9.
>
> (Jan. 3rd Memorandum at 15).

Upon reading LAI's description of *Allegaert,* it would hardly be clear that Chemical Bank in fact had also subordinated its claim to claims of other creditors. Indeed, since, LAI makes no mention of this fact, one would get the impression that the issue was whether Chemical Bank received a preference because it received a payment within the preference period as a result of a subordination in its favor, or whether the payment was made pursuant to its security interest.[10]

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[10] The two "irons in the fire" described by LAI were its "security interest in assets of the Debtor" and its rights as "a senior creditor due

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This simply was not an issue addressed by *Allegaert*. The concern in *Allegaert* was whether Chemical Bank, as a subordinated creditor, received an unauthorized transfer because the payment was subject to the subordination provisions, or alternatively whether Chemical Bank's security interest protected the transfer from avoidance because the payment represented the proceeds of its collateral. The Second Circuit held that because the payment to Chemical Bank was made pursuant to the security interest, the payment was not affected by the subordination provisions of the subordinated loan agreement. LAI's *Corrections and Explanations Addressed to Certain "Examples" of Alleged Violations of Rule 9011 Urged by MHR,* filed May 15, 2001 in response to MHR's motion for sanctions, made no attempt to "correct" or "explain" its misstatement of the facts and holding of the *Allegaert* case.

In subsequent pleadings, LAI made the claim that the subordination provisions were "stripped" from the loan agreement at issue in the *Allegaert* case. The Court's Memorandum Decision found that this also was "a

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to a subordinated loan agreement." When LAI then described "the issue of when Chemical Bank received payment" as turning on "which iron provoked the payment," it posed the debate as one between Chemical Bank's rights as a senior creditor and its rights as a secured creditor, rather than between Chemical Bank's rights as a subordinated creditor and its rights as a secured creditor. LAI's description of the court's holding as determining "that the security interest was paramount as compared to the subordination agreement" gave no indication that the holding actually confirmed MHR's position that its rights as a secured creditor with respect to its collateral were superior to LAI's rights under any subordination supposedly entered into by MHR. LAI then further obscured the issue by claiming that "MHR had agreed in the NPA to subordinate its secured-creditor status to that of LAI."

misstatement of the facts of the case." Commenting upon *Allegaert,* the Court noted that the loan agreement had been amended "in order to be ***consistent*** with the Pledge Agreement" granting a security interest in certain property to Chemical Bank, and that "[t]hus, the Chemical Bank loan remained subordinated but was also collateralized by the debentures." (emphasis in original). Indeed, that was the very reason why the *Allegaert* court had to determine the relative priority of the subordination provision and the security interest.

Rather than attempting to justify the objective reasonableness of LAI's argument after its rejection in the Memorandum Decision, Greene simply repeats the same argument in the Opposition (which was filed months after the Court entered the Memorandum Decision):

> The subordination provision was stripped by the PA which contained an amendment to the SLA which MHR refuses to concede, and seeks sanctions based on its fallacious position.
>
> (Opposition at 13).
>
> MHR can say that the subordination agreement continued in effect, but the Second Circuit essentially indicates that the PA amended it out of significance if not out of existence.
>
> (Opposition at 13).
>
> The SLA had provided for subordination, but the PA amended the SLA to strip the subordination rights of secured creditors. (Opposition at 15).
>
> Language in the *Allegaert* PA served to amend the SLA to strip Chemical Bank's senior creditors under the SLA of their subordination rights. (Opposition at 16).

LAI's argument did not improve with repetition, particularly when it had already been rejected in the Memorandum Decision as a misstatement of the facts of the case. There is no objectively reasonable basis to claim that the subordination provisions were "stripped" out of the loan agreement when the opinion does not so state, but rather specifies that the pledge of collateral and the subordination were to be "construed consistently."[11] Green's continued repetition of this argument does nothing to convince the Court that he should not be sanctioned for advancing it.

LAI also repeatedly claimed that *Allegaert* was irrelevant because in this case, "MHR had agreed in the NPA to subordinate its secured-creditor status to that of LAI." This claim was made in both the Jan. 3rd Memorandum and in the March 29th Supplement. The claim that MHR agreed to subordinate its "secured-creditor status" is manifestly inconsistent with the language of the "Permitted Vehicle Lease" definition relied on by LAI that "no lessor shall have rights of a secured creditor."[12] It is also

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[11] "The SLA [Subordinated Loan Agreement] was amended to conform with the PA [Pledge Agreement]. A new Paragraph 8 was added to the SLA stating that Paragraph 3 of the SLA (which consisted of a subordination and no-security provision) was to be construed consistently with the PA." *Allegaert*, 657 F.2d at 501. To say that the pledge and the subordination are to be construed consistently is hardly the equivalent of saying that the subordination was eliminated or "stripped" from the agreement.

[12] The Memorandum Decision noted that "LAI has never even attempted to explain what this language otherwise could mean" and that LAI had "pretended that the language does not exist, omitting it from the citations in its pleadings, and repeatedly – inaccurately – claiming in its pleadings that 'MHR had agreed in the NPA to subordinate its secured-creditor status to that of LAI.'"

manifestly inconsistent with Second Circuit case law confirming that even a valid, enforceable subordination does not confer any interest in the subordinated creditor's collateral absent a clearly expressed intention to do so. *Allegeart*; *Cherno v. Dutch American Mercantile Corp.*, 353 F.2d 147, 151 (2d Cir. 1965).[13]

In the Opposition, Greene attempted to justify this argument by stating that "LAI has never claimed to have a security interest or a lien under the NPA, so has not thought it particularly necessary to or relevant to constantly state that the NPA specifically excludes a secured-creditor interest in vehicle lessors." However, this explanation cannot be reconciled with LAI's repeated claims that MHR had agreed to subordinate its "secured-creditor status," and LAI's assertions that MHR's exercise of its remedy as a secured creditor by making a credit bid at a sale of the collateral violated a subordination in favor of LAI.

Finally, in its June 12, 2002 *Reply to Opposition to Renewed Motion of Leasing Associates, Inc. for Leave of Court to Further Amend its Amended Complaint,* LAI claimed that "In the instant case the subordination

[13] The *Cherno* decision further discredits LAI's argument that *Allegaert* is distinguishable because there the security interest was granted after the subordination agreement was executed, whereas here the "subordination" and the security interest were created in the same document. Aside from the fact that *Allegaert* confirms the security interest is superior to the subordination when such provisions must be construed consistently, the *Cherno* case confirms that even a subordination executed after a creditor has received a pledge of collateral does not convey any of the subordinating creditor's rights with respect to its collateral unless the subordination agreement expressly so provides. Here, the "subordination" provision relied on by LAI expressly provided that "No lessor shall have rights of a secured creditor."

agreement was made a part of the security agreement" and that "the subordination provision is contained in the security agreement itself." There is simply no basis for this statement. The Security Agreement between MHR and US Pool makes no mention of any subordination agreement or subordination provision.

LAI's characterizations of controlling legal decisions regarding the superiority of a perfected security interest to a subordination agreement, and LAI's representations of the contents of the MHR/US Pool loan documents, were inaccurate, incomplete and misleading. Greene's further submissions provide no objective justification for this conduct, and accordingly, sanctions are warranted. See *In re Cascade Energy & Metals Corp.*, 87 F.3d 1146 (10th Cir. 1996) (citations to statute which omitted several portions and changed the meaning were sanctionable).

3. Preclusive Effect of the Sale Order

After noting that the Sale order "found and held that the sale process was fair, open and reasonable, that the agreement by which MHR acquired US Pool's assets was negotiated, proposed and entered into in good faith and without collusion, that MHR is a good faith purchaser, and that the sale of the property is free and clear of the claims of any parties," the Court's Memorandum Decision concluded that LAI's claims in this adversary proceeding were barred under principles of claim preclusion. It further noted that "The application of claim preclusion is even more clear after considering the issues raised and decided on LAI's Rule 60(b) Motion and its Motion for Reconsideration," in which LAI raised allegations of misconduct by US Pool's counsel in connection with communications with

LAI's counsel regarding documents supporting its supposed subordination claim.

In response to LAI's argument that some claims (i.e., equitable subordination) could not have been raised in the context of its Rule 60(b) Motion, the Court relying on *In re Piper Aircraft Corp.*, 244 F.3d 1289 (11th Cir. 2001) looked to the substance rather than the form of the claim, and found that it "had already conclusively determined that LAI's failure to oppose the sale was the result of its own deliberate decision, rather than the misconduct of any other party. LAI does not get to relitigate those claims by calling them claims for equitable subordination, breach of fiduciary duty or misrepresentation."

The Court concluded that the LAI adversary proceeding "ultimately represent[s] nothing more than an impermissible collateral attack on the Sale Order, after LAI's Rule 60(b) Motion and Motion for Reconsideration were denied, and then unsuccessfully appealed," and that LAI's claims "represent, nothing more than an attempt to relitigate the issues which were already raised and decided in connection with LAI's Rule 60(b) Motion and its Motion for Reconsideration in the main case."

Such impermissible collateral attacks on final orders of the Court are sanctionable under Rule 9011. *In re Ballato,* 183 B.R. 955, 958 (Bankr. M.D. Fla. 1995) ("Motions . . . which simply seek to relitigate old issues are unwarranted or without merit as a matter of law . . . Further, collateral attacks on final orders of a court have no basis in the law within the meaning of F.R.B.P. 9011"); *In re Grantham Brothers,* 922 F.2d 1438 (9th Cir. 1991) (adversary complaint which represented "impermissible collateral attack" on sale order had no basis in law or fact,

and reasonable inquiry would have revealed its impropriety).

4. Unsupported Factual Assertions

Several factual assertions made in LAI's pleadings also fail to satisfy the Rule 9011 requirement that such allegations "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Two particular examples, which were important to LAI's "theory" of the case, were reviewed by MHR at the February 14, 2003 hearing.

LAI claimed in its Amended Complaint, filed November 2001, that it did not object to the sale motion based upon "LAI's Houston counsel having no document to support its subordination rights from either LAI or the Debtor in Possession." LAI also claimed in its Jan. 3rd Memorandum that LAI's vice president of credit, Ron Janak, "was unable to provide Mr. Rothberg with specific information about the NPA in early August 2001." During a deposition of Mr. Janak taken months later in February 2002, Mr. Janak produced two documents from LAI's files that evidenced that at all relevant times LAI was in possession of sufficient information both to identify the document which was the source of its supposed subordination rights, and the specific language it relied on: (1) a fax with the page of the NPA which contained the "Permitted Vehicle Lease" language; and (2) the cover page of the NPA containing the full title of the document.

Mr. Janak testified at the February 14, 2003 hearing that prior to the time that LAI filed its Amended Complaint, neither Mr. Greene nor his co-counsel had asked

LAI to go through its files to determine if it possessed documents that would support its subordination claim, and that the first time he was asked to do so was in preparation for his February 2002 deposition. In other words, counsel never asked LAI to go through its own files to look for documents supporting its subordination claim before the sale hearing, before filing the Rule 60(b) Motion, before filing the Complaint, or before filing the Amended Complaint claiming that LAI had been misled by BSPA.

LAI's attempt in its Opposition to characterize this as a discovery dispute misses the point. While LAI's failure to produce the documents at an earlier Rule 30(b)(6) deposition duces tecum of its corporate representative is questionable, the subject of MHR's request for sanctions is not the failure to produce the documents, but LAI's allegation, included by counsel in the Amended Complaint and in the Jan. 3rd Memorandum, that LAI had no document and was unable to provide specific information to its counsel before the sale hearing. LAI could not have known whether or not it had a document without looking, yet counsel failed to even instruct LAI to review its files before making that allegation. Indeed, LAI did have such documents in its files, and would have been able to provide both the exact title of the NPA and the specific language of the "Permitted Vehicle Lease" provision it relied on, if counsel had taken the most basic step of instructing its client to review its own files.

Greene's failure to undertake that inquiry, or to direct his client to do so before alleging that LAI had "no document" to support its claim, reflects a failure to comply with the requirements of Rule 9011. Greene's attempt to explain that LAI did not provide the documents because

LAI "did not realize" that it had them (Opposition at 7) fails to address the issue of why LAI's counsel never suggested that LAI look for them. It also reflects a significant flaw in LAI's theory of the case, as espoused by Greene. LAI's claim that its counsel was misled by BSPA because it had "no document" to support LAI's subordination claim is simply unwarranted when LAI did in fact have relevant portions of the very documents it relied on for its purported subordination claim.

The Amended Complaint prepared by Mr. Greene also alleged that "Defendant U.S. Pool was under the effective control of MHR and acting as an agent of MHR when it failed to comply with the fiduciary duty to supply information." This contention was at the heart of LAI's theory that US Pool, through its counsel BSPA, had deliberately attempted to interfere with LAI's exercise of its supposed subordination rights. At the February 14, 2003 hearing, Mr. Greene claimed that the evidence that supported that allegation was a search of the Florida corporate public records, and a conversation he had with Lee Morris from which he "had gotten the impression that MHR was in control." Those public records were also referred to in an Affidavit filed by Mr. Greene on January 3, 2002, in which he attested that "These records combined with the employment application of Berger Singerman indicate that Mark Rachesky was the sole director [of US Pool] when the Chapter 11 petition was filed."

In fact, those public records which were attached to Mr. Greene's Affidavit, reflect that at all relevant times, the directors of US Pool were either: (1) Alan Kane, Ed

Mellul, and Mark Rachesky;[14] (2) Ed Mellul and Mark Rachesky; or (3) Richard Andron and Mark Rachesky. They provide no basis for Mr. Greene to attest that Mr. Rachesky was the sole director of US Pool on the petition date.

In subsequent pleadings, LAI contended that MHR was nonetheless "in complete control of the Debtor's board of directors" because it had "hand picked" Mr. Andron to be the new CEO. When asked at the February 14, 2003 hearing for evidence that Mr. Andron was controlled by MHR, the only evidence which Mr. Greene could identify was contained in a January 10, 2001 letter from Mark Rachesky to the three other directors of US Pool at the time, indicating that "MHR has identified an individual who has tentatively agreed to become CEO of the company." This letter fails to evidence any control by MHR over Mr. Andron. Indeed, as Mr. Greene himself acknowledged, Mr. Andron testified at deposition that it was Roger Gladstone, one of the other shareholders of US Pool, not MHR, that initially solicited him to join US Pool. Mr. Greene identified no other connections between Mr. Andron and MHR that would have evidenced MHR's control over him.

Having considered Mr. Greene's description of the inquiry he performed and the facts he relied on, the Court finds that the allegations that US Pool was under the "complete control" of MHR and acting as its agent were not based upon an objectively reasonable inquiry, did not

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[14] Mr. Rachesky is a principal of MHR. The other individuals have no affiliation with MHR.

have evidentiary support, and therefore violated Rule 9011.

5. The *Motion* to *Further Amend to Join BSPA*

LAI's renewed Motion to Further Amend its Amended Complaint to add BSPA as a party defendant, and the proposed Second Amended Complaint submitted with minor changes after receipt of BSPA's "safe-harbor letter" also violated Fed.R.Bankr.P.9011. The Court declined to address the misrepresentation and breach of fiduciary claims against BSPA in its Memorandum decision based on the doctrine of futility of amendment. *Rudolph,* 800 F.2d at 1042; *Holywell,* 177 B.R. at 981. The Court reasoned that because LAI never had any subordination rights as against MHR, there was nothing BSPA could have done that would have damaged LAI; in other words, BSPA could not have impaired rights that did not exist as a matter of law. Reviewing LAI's allegations against BSPA reveals that they were without merit, factually or legally, and that they are sanctionable.

The crux of LAI's misrepresentation claim was that BSPA misrepresented its lack of knowledge of the existence of a document that "effectively" subordinated MHR's rights to LAI. BSPA's answer was accurate because no such document or agreement existed which was effective to subordinate MHR's rights to those of LAI. The Court notes that LAI has always acknowledged that there was no subordination agreement between MHR and LAI. Moreover, as stated above, the testimony before the Court, was that the draft subordination agreement LAI had prepared for US Pool to forward to MHR was ripped up prior to the time when US Pool filed its bankruptcy case

and was never even presented to MHR. Also, contrary to LAI's argument, the NPA did not subordinate, "effectively" or otherwise, MHR's rights to those of LAI. The Court notes that the basis for LAI's misrepresentation claim, the existence of a document that "effectively" subordinated MHR's rights to those of LAI, is inconsistent with LAI's preparation of a subordination agreement for US Pool to present to MHR.

The Court also rejects LAI's allegation that BSPA backdated a supplement to the NPA which contained no subordination provisions. At the February 14, 2003 hearing, Mr. Greene acknowledged that one can send an e-mail with an attached document that had been previously drafted. The fact that the e-mail was dated after the date of the attached draft apparently was LAI's "smoking gun." However, the evidence before the Court was to the effect that a BSPA associate sent the previously drafted supplement from the computer of another attorney who was not in the office at that time. That evidence contradicts LAI's unproven allegation that BSPA engaged in back-dating of documents in this case. The record also demonstrates that LAI, through Greene, had full opportunity to review the document that it maintained gave it subordination rights against MHR, by attending either of two hearings at which BSPA handed out copies of the critical documents to all attorneys and parties in interest who attended and requested such documents, or by going to the clerk's office to review the file. LAI never took advantage of those opportunities. In short, there was no factual basis for LAI's misrepresentation allegation as set forth by Mr. Greene in the Motion to Further Amend, and in the proposed Second Amended Complaint, and therefore the allegation is sanctionable.

The legal flaw in LAI's breach of fiduciary duty allegation is that BSPA, as counsel to US Pool, the chapter 11 debtor, owed no such duty to LAI, a sophisticated creditor represented by independent counsel. The only case law cited to by LAI, in papers signed by Greene, were factually distinguishable cases standing for the general proposition that chapter 11 counsel owes a fiduciary duty to the estate as a whole. *See, e.g., In re Wilde Horse Entertainment, Inc.*, 136 B.R. 830, 840 (Bankr. C.D. Cal. 1991) ("The attorney for [sic] debtor-in-possession is a fiduciary of the estate."). To this day, LAI has not cited even one case standing for the proposition urged – that counsel for a chapter 11 debtor owes a fiduciary duty to an individual creditor. BSPA, however, cited the Court to *In re ICM Notes, Inc.*, 278 B.R. 117 (S.D. Tex. 2002), which expressly holds that no such duty exists. The Court in *ICM Notes* rejected the very type of case law cited by LAI above, stating that the attorney in that case had not provided "any precedent beyond the general finding of a fiduciary duty to the estate" that would warrant the imposition of a fiduciary duty to a particular creditor. *Id.* at 126.

The Court agrees with BSPA's contention that the assertion of the existence of a fiduciary duty to a particular creditor, especially one that is a sophisticated commercial entity represented by independent counsel like LAI, is a legal contention not warranted by existing law or by non-frivolous argument for the extension, modification or reversal or the establishment of new law in violation of Rule 9011(b)(2). As a factual matter, it is unlikely that counsel for a chapter 11 debtor's counsel would give what can only be described as legal advice (here, the interpretation of a contract) to a creditor represented by its own counsel who had access to the document in question. The

Court rejects LAI's breach of fiduciary duty claim on this ground as well.

In addition, the Court's Memorandum Decision found that the doctrine of claim preclusion applied to LAI's claims of wrongdoing on the part of BSPA in that the allegations of wrongdoing were considered by the Court and rejected by the orders denying LAI's Rule 60(b) Motion and Motion for Reconsideration. LAI voluntarily dismissed its appeal of the District Court's summary affirmance of those orders. Thus, even if there were some merit to LAI's allegations against BSPA, which there is not, the attempt to raise these allegations after having lost the Rule 60(b) Motion and Motion for Reconsideration, lost on appeal to the District Court, then voluntarily dismissed its appeal, was sanctionable under Rule 9011 and also under 28 U.S.C. § 1927, as the multiplication of proceedings in an unreasonable and vexatious manner. The filing of the initial Motion to Further Amend, and the refiling thereof, spawned a substantial amount of meritless litigation, resulted in substantial costs and fees in defense thereof, and constituted impermissible, collateral attacks on orders that were long since final and non-appealable. This type of litigation is sanctionable. *See Grantham; Ballato, supra.*

6. Indicia of Failure to Adequately Investigate Claims

The most compelling evidence of lack of investigation came from the Trustee, Ms. Menotte, who is an independent party. Ms. Menotte testified that shortly after the Debtor's case was converted to a case under chapter 7, she received a call from Mr. Greene and Mr. Rothberg wherein

they offered the US Pool estate 10% of any recovery from a suit against the Debtor and BSPA in return for her waiver of the attorney-client privilege she owned as Trustee. Ms. Menotte testified that in a subsequent call with Mr. Greene and Mr. Rothberg, and Michael Bakst, acting as counsel to the Trustee, she relayed to Mr. Greene and Mr. Rothberg her belief that the documents at issue where subordination language was removed did not affect LAI's position vis-a-vis MHR, and therefore she saw no reason for the estate to join in the suit. Ms. Menotte testified that she asked Mr. Greene and Mr. Rothberg if they had explored the issue of whether LAI had subordination rights under the original NPA and they responded that they had not done so. Ms. Menotte further testified that "they," *i.e.*, Mr. Greene and his co-counsel Mr. Rothberg, made a comment to the effect that they had not fully focused on the subordination cause of action as they were more interested in looking at the suit against BSPA. Ms. Menotte reported these conversations to the Office of the U.S. Trustee.[15] This testimony supports a finding that LAI, on advice of Greene, did not do sufficient investigation of the underlying subordination claim, but was instead looking for deep pockets from which to recoup LAI's claim.

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[15] Ms. Menotte also testified that after her review of BSPA's files, including privileged documents, she saw no evidence of backdating as alleged by LAI. Mr. Janak also testified to the effect that notwithstanding his belief that there had been backdating, based solely on statements made by Greene, he never saw any documents demonstrating same. As discussed herein, Greene's backdating allegation was based upon an allegation concerning a July 6, 2001 e-mail from Phyllis Bean, a BSPA associate, which had a first supplemental agreement attached thereto; however, Ms. Menotte testified that there was no way to determine when the attached document had been drafted.

In that regard, Mr. Janak testified that Mr. Greene was the driving force behind the decision to seek to add BSPA as a party defendant. Mr. Janak testified that he expressed concerns as to attempting to join BSPA as a party defendant. Mr. Janak further testified that either Mr. Greene or Mr. Rothberg (he couldn't recall which) advised LAI that there was nothing wrong with suing a law firm and that it would increase LAI's chances of recovery because BSPA had the resources to satisfy any potential judgment. Mr. Janak testified that he relied totally on counsel in making LAI's decision to go forward with the suit against BSPA.

Mr. Janak testified that even after LAI was named as a respondent in MHR's sanctions motion, Greene did not advise LAI to get independent counsel to evaluate the matter. Mr. Janak testified that Mr. Greene also did not advise LAI to get independent counsel when MHR made a settlement offer that would have released LAI from liability and preserved only MHR's right to pursue counsel. Mr. Janak further testified that LAI's counsel advised LAI to appeal to the Eleventh Circuit notwithstanding the District Court's ruling that LAI's appeal of this Court's summary judgment opinion was frivolous, and the District Court's granting the movants' motions for sanctions. Mr. Janak testified that Mr. Greene probably advised as to the no-third party beneficiary clause in the NPA, but that he still believed that LAI had subordination rights as against MHR. Mr. Janak testified that Mr. Greene did not ask LAI to go through its files to determine if it possessed documents that would support its subordination claim prior to LAI filing the November 29, 2001 Amended Complaint, which alleged that LAI's counsel had no documents to support its subordination rights. The first time that Mr.

Janak was asked to go through his files to look for information relating to LAI's subordination claim was in preparation for his February, 2002 deposition.

IMPOSITION OF RULE 9011 SANTIONS

1. *Rule 9011 Sanctions in Favor of MHR are appropriate*

The facts set forth above evidence multiple violations of Rule 9011 by Greene. The Court finds that imposition of sanctions against Greene and in favor of MHR are appropriate pursuant to the terms discussed below.

2. *BSPA Is Ineligible for an Award of Sanctions Under Rule 9011*

The Court has determined that Greene committed multiple violations of Rule 9011. Notwithstanding these violations, Greene argues that as a pro se party, BSPA cannot be awarded Rule 11 sanctions. The Court agrees. Under Rule 9011(c)(2) the sanction imposed may include, "an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses **incurred** as a direct result of the violation." (emphasis added) Fed. R. Bankr. P. 9011(c)(2). The Eleventh Circuit has held that the plain language of Rule 11 prohibits an award of attorney's fees to a party proceeding pro se. *Massengale v. Rey*, 267 F.3d 1298, 1303 (11th Cir. 2001). "Because a party proceeding pro se cannot have incurred attorney's fees as an expense, a district court cannot order a violating party to pay a pro se litigant a reasonable attorney's fee as part of a sanction." *Id.* The Eleventh Circuit reserved for future decision the question of whether a pro se litigant can properly be awarded a Rule

11 sanction measured by the loss of income suffered by the pro se litigant as a result of having to take time off work to respond to the sanctionable conduct. *Id.* at n.2.

The Court of Appeals for the Federal Circuit has also found that pro se litigants cannot incur attorney fees. *Pickholtz v. Rainbow Tech., Inc.*, 284 F.3d 1365, 1375 (Fed. Cir. 2002). The sanctions at issue in *Pickholtz* had been sought in connection with Fed.R. Civ.P. 37(a)(4)(A), which like Rule 11 "require that the expenses be 'incurred'". *Id.* The *Pickholtz* court noted that, "one cannot 'incur' fees payable to oneself, fees that one in [sic] not obliged to pay. . . . Moreover the word 'attorney' connotes an agency relationship between two parties (client and attorney), such that fees a lawyer might charge himself are not 'attorney fees' . . . Nor are such fees a payable 'expense,' as there is no direct financial cost or charge associated with the expenditure of one's own time." *Id.* (*citing Massengale*, 267 F.3d at 1303).

The Court of Appeals for the Federal Circuit addressed the question of sanctions for lost income or lost opportunity costs which had been left open by the Eleventh Circuit in *Massengale*. The court found that an award of attorney's fees to a pro se lawyer was not warranted as an opportunity cost for income lost as a result of time away from work. The court saw no meaningful distinction "whether a pro se litigant seeks an award of attorney fees 'as though he had been represented by counsel' or as an opportunity cost." 284 F.3d at 1376. In both cases the court found that the award of attorney fees to a pro se litigant is not within the plain meaning of the rule. *Id.* Accordingly, this Court finds that as a pro se litigant, BSPA is not eligible to receive an award of sanctions pursuant to Rule 9011 for attorneys fees in connection

with this matter. BSPA is however eligible to receive costs actually incurred pursuant to Rule 9011.

IMPOSITION OF SANCTIONS PURSUANT 28 U.S.C. § 1927

1. § *1927 Sanctions in Favor of MHR are Appropriate*

The facts set forth herein also warrant the imposition of sanctions pursuant to 28 U.S.C. § 1927, as the above-described litigation conducted by LAI, through Greene and on his advice, can only be described as the multiplication of proceedings in an "unreasonable" and "vexatious" manner. "Unlike Rule 11, which is aimed primarily at pleadings, under section 1927 attorneys are to avoid dilatory tactics throughout the entire litigation." *Byrne,* 261 F.3d at 1106. There can be no question here that "dilatory tactics" were employed, and that these proceedings were "multiplied" based on the pleadings filed and positions taken by LAI, on Greene's advice. Likewise, there can be no question that the multiplication of these proceedings was "unreasonable" and "vexatious" in that insufficient grounds existed, factually or legally, for the filing of the pleadings and the positions taken by LAI. This Court is of the belief that it has the authority to issue Section 1927 sanctions, *see In re Grewe*, 4 F.3d 299 (4th Cir. 1993), *cert. denied*, 510 U.S. 1112 (1994); *In re Yochum,* 89 F.3d 661 (9th Cir. 1996); *In re Lawrence*, Case No. 97-14687 (Bankr. S.D. Fla., June 2, 2000) (unpublished),[16] *aff'd in unpublished opinion*, (S.D. Fla. 2000);

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[16] In so finding, the Court acknowledges that there is Eleventh Circuit case law holding that Bankruptcy Courts are not "courts of the United States." *See In re Brickell Inv.*, 922 F.2d 696 (11th Cir. 1991);

(Continued on following page)

In re Brooks, 175 B.R. 409 (Bankr. S.D. Ala. 1994), and that the imposition of sanctions in favor of MHR under that section are warranted in this case.

2. *BSPA Is Ineligible For An Award of § 1927 Sanctions*

The court's conclusion that BSPA is ineligible for an award of sanctions pursuant to Rule 9011 compels a similar conclusion as to BSPA's ineligibility for an award of sanctions pursuant to 28 U.S.C. § 1927. Section 1927 provides that an attorney who "so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs,

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In re Davis, 899 F.2d 1136 (11th Cir. 1990). However, neither *Brickell Inv.* nor *Davis* involved section 1927; *Brickell* concerned the Bankruptcy Court's ability to award attorneys' fees pursuant to 26 U.S.C. § 7430 and *Davis* concerned the Bankruptcy Court's ability to award attorneys' fees pursuant to 28 U.S.C. § 2412. The Court follows the lead of two Bankruptcy Courts within the Eleventh Circuit, *Lawrence* and *Brooks,* and one District Court in the Eleventh Circuit (affirming the Bankruptcy Court's decision in *Lawrence),* and case law from other Circuits, *e.g., Crewe* and *Yochum,* in holding that Bankruptcy Courts, as units of the District Court, 28 U.S.C. § 151, can issue Section 1927 sanctions. The Bankruptcy Court in *Lawrence* adopted the analysis set forth in *Crewe* and *Yochum* and, in so doing, noted that, unlike the Tax Court or other Article I courts, bankruptcy courts do not exist as separate and distinct judicial entities; they are "units" of the District Court and, therefore, for "jurisdictional purposes, . . . there is only one court – the district court." *Lawrence,* slip opinion, at 7. The Court agrees with the *Lawrence* court's conclusion that the Bankruptcy Court's "ability to award sanctions under 28 U.S.C. § 1927 flows from its jurisdictional relationship with the district court." *Id.* For these reasons, the Court finds that as a "unit" of the District Court, which is clearly a "Court of the United States," it can award section 1927 sanctions.

expenses and attorney's fees reasonably **incurred** because of such conduct." 28 U.S.C. § 1927 (emphasis added). The language of section 1927 is the same as the language of Rule 9011 insofar as both require that attorney's fees be "incurred" in order for an award to be made. As discussed above, the only two circuits to have ruled on the issue found that a pro se litigant cannot "incur" attorney's fees. Therefore, the Court finds that as a pro se litigant, BSPA is not eligible for an award of attorney's fees under 28 U.S.C. § 1927. BSPA is however eligible to receive costs actually incurred pursuant to section 1927.

SANCTIONS UNDER COURT'S INHERENT AUTHORITY

In determining that a pro se litigant is not entitled to an award of section 1927 sanctions, the Federal Circuit found that in the proper circumstances sanctions may be applied in favor of a pro se litigant pursuant to a court's inherent powers. *Pickholtz,* 284 F.3d at 1377. Failure to impose sanctions in favor of a pro se attorney, "would place a pro se litigant at the mercy of an opponent who might engage in otherwise sanctionable conduct, but not be liable for attorney fees." *Id.* This Court, having determined that BSPA is ineligible to receive an award of sanctions under Rule 9011 or section 1927, finds that the Court's inherent powers provide a basis upon which to award sanctions in favor of BSPA. The Supreme Court commenting upon the relationship between inherent powers and express rules explained:

> [The inherent] power is both broader and narrower than other means of imposing sanctions.

> First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices. *Id.* (*citing Chambers v. NASCO,* 501 U.S. 32 (1991)).

"Exercise of the court's inherent power must be done with 'restraint and discretion.'" *Id.* (*citing Chambers*). In the Eleventh Circuit imposition of sanctions against a lawyer under a court's inherent power requires a finding of bad faith on the part of the violating attorney. *Thomas v. Tenneco Packaging Co., Inc.,* 293 F.3d 1306 (11th Cir. 2002). "A finding of bad faith is warranted where an attorney knowingly or recklessly raises a frivolous argument . . . A party also demonstrates bad faith by delaying or disrupting the litigation or hampering the enforcement of a court order." *Id.* (citations omitted).

While the Court is well aware that sanctions imposed under its inherent authority are to be imposed sparingly, *Mroz,* 65 F.3d at 1575, it believes that independent of Rule 9011 and Section 1927, the exercise of the Court's inherent authority is appropriate in this case. *See Chambers,* 501 U.S. at 49 (trial court can exercise inherent powers to sanction "even if procedural rules exist which sanction the same conduct"). The same facts that warrant the imposition of sanctions pursuant to Rule 9011 and section 1927 warrant the exercise of the Court's inherent authority to sanction Greene. As described above, Greene had every opportunity to put an end to what BSPA's counsel referred to as this "madness," yet Green unreasonably failed to take advantage of those opportunities. These proceedings advanced to this point because of Greene's continued

assertion of allegations that lacked support, factually or legally, allegations which never should have been asserted in the first place.

The Court's inherent authority "is derived from court's need 'to manage its own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Byrne*, 261 F.3d at 1106 (quoting *Chambers*, 501 U.S. at 43)). The Court finds that Greene's actions in this case, as set forth in detail above, can be fairly characterized as having been taken in "bad faith," "vexatiously," "wantonly," and for "oppressive" reasons. As such, the Court finds it appropriate to exercise its inherent authority and impose sanctions in favor of BSPA and MHR as set forth below.

AMOUNT OF SANCTIONS

MHR and BSPA submitted into evidence documentation of the fees and costs of defending this adversary proceeding, and proffered testimony supporting the fact that these fees and costs were actually incurred or absorbed in connection with the action. The parties stipulated that expert testimony would not be required to support the reasonableness of the fees. Based upon its own knowledge and experience concerning reasonable and proper fees, the Court may also form an independent judgment without the aid of witnesses as to the value of the services provided. *See, e.g., Matter of TMT Trailer Ferry, Inc.*, 577 F.2d 1296 (5th Cir. 1978);[17] *In re Martinez,*

[17] Decisions of the former Fifth Circuit rendered prior to close of business on September 20, 1981 are binding as precedent on all federal courts within the Eleventh Circuit. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

266 B.R. 523 (Bankr. S.D. Fla. 2001), *aff'd,* 271 B.R. 696 (S.D. Fla. 2001), *aff'd,* 311 F.3d 1272 (11th Cir. 2002).

The evidence submitted reflects that MHR incurred a total of $79,600.50 in fees and $10,148.63 in costs (for a total of $89,749.13) in connection with this action. The evidence submitted reflects that BSPA absorbed a total of $205,021.50 in fees and incurred $9,265.65 in costs (for a total of $214,287.15) in connection with this action.

Mr. Greene has suggested that the amount of fees and costs incurred by MHR and BSPA are unreasonable, and in particular questioned why it should have cost so much to defend the action if the claims were frivolous. This Court, like others faced with similar arguments, finds these complaints unpersuasive:

> One question that does seem to seep between [respondent's] lines is that if this litigation is so frivolous, why did it require so much time and effort to defend against it? We have insisted that a party cannot 'foist its expenses off on its adversaries,' especially when '[s]hallow claims may require costly replies.' . . . These claims may have been shallow, but the volume of pleadings, documents, and other clutter in the record could fill a bottomless pit. We have little sympathy for the litigant who fires a big gun, and when the adversary returns fire, complains because he was only firing blanks. *Brandt v. Schal Assocs., Inc.,* 960 F.2d 640, 648 (7th Cir. 1992).

In this case, MHR moved for summary judgment within days after LAI filed its Amended Complaint. LAI sought to take additional discovery, seeking and taking depositions of multiple representatives of MHR, a representative of US Pool, as well as lawyers for both MHR and

US Pool. LAI sought to expand the briefing on summary judgment, resulting in multiple rounds of briefing by both parties. In March 2002 BSPA objected to the Motion to Further Amend seeking to join it as a defendant and filed its motion for sanctions in response, in an effort to terminate litigation. This Court cautioned Mr. Greene, advising him during a hearing on March 15, 2002 that although different judges had different philosophies about Rule 11, this Court was a strong proponent of the rule. The Court further advised Mr. Greene that attorney fees would be assessed if the Court determined that the Rule had been violated. MHR served its motion for sanctions in April 2002, before the Court had even ruled on the Summary Judgment Motion, in an effort to convince LAI to terminate the adversary proceeding. In the face of BSPA's motion, MHR's motion served shortly afterwards, and the Court's unambiguous admonition, Mr. Greene nonetheless elected to press forward with his pursuit of this litigation, and indeed refiled LAI's Motion to Further Amend its Amended Complaint after initially withdrawing it in response to the Rule 9011 motions. LAI – on Greene's advice – continued the prosecution of the adversary proceeding. Greene sought and was granted, over the movants' objection, leave to take discovery in connection with the Rule 9011 proceedings, resulting in further depositions of MHR's and US Pool's counsel even after the merits of this matter were resolved by the Memorandum Decision.

Mr. Greene then appealed to the District Court after this Court entered a Memorandum Decision granting summary judgment wherein the Court discussed the deficiencies of many of the arguments which Mr. Greene again raised on appeal.

Even after the District Court imposed sanctions on Mr. Greene for the fees and costs of LAI's second appeal of the Summary Judgment Order on December 20, 2002, Mr. Greene still persisted in prosecuting an appeal of the District Court's *Order Affirming Bankruptcy Court in All Respects* to the Eleventh Circuit Court of Appeal. Despite the District Court's finding that the appeal was frivolous and that the Summary Judgment Order "disposed of all issues in this litigation," and despite the entry of the District Court's Sanctions Order imposing sanctions for all of MHR and BSPA's fees and costs in the appeal,[18] Mr. Greene prepared a Statement of Issues for the Eleventh Circuit which was a verbatim repetition of the issues he had identified on appeal to the District Court, issues that had already been determined to be sanctionable.

The expenses incurred by MHR and BSPA are the result of Greene's filing and prolonging this action without an objectively reasonable basis for doing so.[19] Accordingly, the Court finds that MHR and BSPA's costs in pursuing and obtaining Rule 9011 sanctions are awardable as sanctions. *Mike Ousley Productions, Inc. v. WJBF-TV*, 952 F.2d 380 (11th Cir. 1992); *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991), *cert. denied*, 502 U.S. 855 (1992); *In re Tutu Wells Contamination Litigation*, 120 F.3d 368, 388 (3d Cir. 1997) ("The time, effort and resources expended in bringing sanctionable conduct to light would have been

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[18] MHR and BSPA's costs and fees for the appeal at this point in time collectively totaled in excess of $63,000.

[19] The Court notes as of the time of filing its Summary Judgment Motion on December 10, 2001, MHR had incurred less than $10,000 in fees in this action, a small fraction of the total of nearly $90,000 in fees and costs it has incurred in this action.

unnecessary had the sanctionable conduct never occurred. These costs are as much a harm to a party in the litigation as is the delay in the litigation or the substantive prejudice caused by the conduct. If excluded from a possible award the costs of sanctions proceedings, we would undermine the compensatory goal of a sanctions award.")

Mr. Greene's conduct throughout the course of this litigation evidences that neither the threat of sanctions nor the actual imposition of sanctions has to date had any deterrent effect on his continuing pursuit of frivolous claims. Mr. Greene's first warning was in October 2001, when the Court, in rejecting his motion for a stay of the Order Denying Rule 60(b) Motion, stated that there was "no likelihood of success on the merits, that there isn't a serious issue on appeal." Mr. Greene nonetheless persisted in his prosecution of an appeal of the Order Denying Rule 60(b) Motion which was then rejected by District Judge Ryskamp. Mr. Greene also persisted in the pursuit of this adversary proceeding even after the Order Denying Rule 60(b) Motion rejected LAI's efforts to preserve these claims from the preclusive effect of the Sale Order, and he continued to prosecute it even after that Order was affirmed on appeal.

The Court has considered the evidence, as well as its own knowledge and experience, and finds that the fees and costs requested by MHR and the time spent by BSPA are reasonable in light of the issues raised and the work required to be performed.

The amount of the fees and costs is however only the starting point in the Court's analysis for the imposition of an appropriate sanction award.

1. *The Allocation of $250,0000 Settlement Proceeds*

The Motion for Approval of Allocation Proceeds shows that $130,000 was paid to MHR and $120,000 was paid to BSPA.

A. *MHR*

In the case of MHR, $89,749.13 of the $130,000 settlement proceeds received by MHR was allocated for the entire amount of the Rule 9011 sanctions sought herewith. The Allocation Motion states that "no further monetary sanction need be awarded with respect to MHR if Greene is given the benefit of the funds received by MHR from LAI and Rothberg." Based upon that representation, the Court approves the allocation of settlement proceeds in the amount of $89,749.13[20] to satisfy the entire amount of Rule 9011 sanctions sought against Greene herewith. The Court however expresses no opinion as to the allocation of the remaining $40,250.87 of settlement proceeds received by MHR. Whether and to what extent the remaining settlement proceeds should be applied as a credit for the benefit of Greene with respect to said Rule 8020 sanctions of $46,219.30 is an issue to be determined by the District Court. The Court similarly expresses no opinion as to whether any malpractice insurance proceeds received by MHR pursuant to LAI's claim should be applied as a setoff for the benefit of Greene with respect to the Rule 8020 sanctions. Having approved the allocation of $89,749.13 (the entire amount sought by MHR in this matter) for Rule 9011 sanctions, the Court finds that

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[20] The $89,749.13 sought here is in addition to $46,219.30 sought in connection with Rule 8020 sanctions for the District Court Appeal.

Greene shall not be required to make any payment to MHR for Rule 9011 sanctions.

B. *BSPA*

In the case of BSPA, $59,873.26 of the $120,000 settlement proceeds received by BSPA was allocated for the sanctions requested from Greene in this matter. BSPA seeks total sanctions in the amount of $214,287.15 herewith.[21] The Allocation Motion states that the net sanctions claim against Greene after application of the settlement funds is $154,413.89. The Court approves the allocation of settlement proceeds in the amount of $59,873.26 for sanctions requested from Greene herewith. The Court however expresses no opinion as to the allocation of the remaining $60,126.74 of settlement proceeds received by BSPA. Whether and to what extent the remaining settlement proceeds should be applied as a credit for the benefit of Greene with respect to Rule 8020 sanctions of $46,413.48 is an issue to be determined by the District Court. The Court similarly expresses no opinion as to whether any malpractice insurance proceeds received by BSPA pursuant to LAI's claim should be applied as a setoff for the benefit of Greene with respect to said Rule 8020 sanctions.

C. *Greene's Ability to Pay*

Finally, the Court addresses Greene's assertion that no monetary sanctions should be imposed because of his

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[21] The $214,287.15 sought here is in addition to $46,613.48 sought in connection with Rule 8020 sanctions for the District Court Appeal.

financial condition. Greene first raised the issue of ability to pay in a Supplement and Declaration filed on February 12, 2003, two days before the sanctions hearing, even though the sanctions motions had been pending for almost a year, and multiple responses, objections and supplements had been filed.[22] At the February 14, 2003 hearing, Greene rested his case without presenting any testimony regarding his financial condition and without attempting to move his Declaration into evidence.

The Court is obligated to consider Mr. Greene's financial condition in determining what sanctions to impose, *Baker v. Alderman,* 158 F.3d 516 (11th Cir. 1998). At the Court's prompting and after MHR and BSPA agreed to waive any objections to reopening Mr. Greene's case, Mr. Greene testified as to his present assets and liabilities. Mr. Greene then adopted the Declaration he had filed two days earlier. Mr. Greene's testimony and Declaration reflect that he owns a home which he claims has a value of $215,000 to $230,000, he has an interest in other real property in New York worth approximately $10,000, he has various brokerage and IRA accounts with approximately $2,000 in assets, and according to the bank statements attached to his Declaration, he had approximately $8,500 in his personal bank account and approximately $6,750 in the Michael E. Greene, P.A. bank account. Greene testified that Michael E. Greene, P.A. has approximately $15,000 in "reasonably

[22] Greene did not raise the issue in responding to MHR's interrogatories requesting "all evidence you may present with respect to the appropriate sanction to be imposed" which were propounded in September 2002, and to which Mr. Greene provided supplemental responses as recently as February 10, 2003.

collectible" receivables. Greene's home has a first mortgage of approximately $80,000 and a home equity line of credit with a balance of approximately $20,000, leaving in excess of $100,000 in equity according to Greene's valuation. The only other significant debt Greene identified is a $43,000 credit card debt (discussed in greater detail below) and potential tax liabilities of approximately $4,000 to $5,000.

Mr. Greene testified that during the past several years he has earned on average approximately $75,000 to $90,000 per year. Due in large part to his fees in these proceedings, during the past two years he earned more, approximately $101,000 in 2001, and $118,000 in 2002.

Greene also testified that in direct response to the District Court's Sanctions Order, he transferred title to an automobile worth approximately $15,000 to $20,000 (with no liens) from himself to his wife because "she was the principal operator" of the vehicle, "so that there would be no question that it was her car." In addition, within thirty days of the District Court's Sanctions Order, Mr. Greene took a $43,000 cash advance on a credit card and used approximately $27,000 to pay down most of an outstanding home equity line of credit secured by a mortgage on his homestead.[23] As a result, Greene now has approximately $50,000 in availability on the home equity line of credit. Greene testified that the approximately $16,000 balance of the funds from the credit card advance was

[23] The Florida Constitution generally grants residents an unlimited exemption for the value of their homestead residential property, even where the owner acquires the homestead or transfers funds to increase his equity in the property with the intent to hinder, delay or defraud creditors. *Havoco of America, Ltd. v. Hill*, 790 So.2d 1018 (Fla. 2001).

deposited into his P.A. account and then disbursed to himself as a draw or shareholder's distribution.

The Court finds the circumstances and timing of these transfers, including Mr. Greene's acknowledgment that the transfer of the vehicle was done in direct response to the District Court sanctions order, are indicative of an intent on the part of Mr. Greene to hinder the recovery of any monetary sanctions that could be imposed either pursuant to the District Court's sanctions order or the pending sanctions motions.

At the June 20, 2003 hearing on the Motion to Approve Allocation of Settlement Proceeds, Mr. Greene stated that his financial condition had seriously deteriorated since the February 14, 2003 hearing as his income had dwindled to roughly $3,000 in the first quarter of 2003. Mr. Greene stated that he has no ability to pay more than a few thousand dollars. The Court is not persuaded that Mr. Greene's financial condition precludes the imposition of monetary sanctions, since to do so would ignore that the aforesaid transfers have been a significant factor in his stated inability to pay such monetary sanctions. To so find would essentially mean that Rule 9011, section 1927 and the court's inherent powers apply only to wealthy attorneys and law firms, and that lawyers of lesser means can frivolously increase the cost of litigation to opponents with impunity.

The Court is mindful that, "Sanctions orders must not involve amounts that are so large that they seem to fly in the face of common sense, given the financial circumstances of the party being sanctioned . . . And, sanctions must never be hollow gestures, their bite must be real. For the bite to be real, it has to be a sum that the person might

actually pay. A sanction which a party clearly cannot pay does not vindicate the court's authority because it neither punishes nor deters." *Martin v. Lamborghini*, 307 F.3d 1332 (11th Cir. 2002) (holding that the financial circumstances of the party must be considered when imposing sanctions under a court's inherent power) (citations omitted).

The Court finds that after allocating settlement proceeds of $59,873.26 in favor of Greene, the remaining amount of $154,413.89[24] in sanctions sought by BSPA from Greene clearly exceed his ability to pay. While Greene's financial condition may well have deteriorated since February, Greene may not completely avoid liability for his actions by deliberately creating an inability to pay. The Court finds that Green took action with the apparent intention of hindering MHR and BSPA in recovery of monetary sanctions by transferring an automobile valued between $15,000-$20,000 to his wife and by paying approximately $27,0000 [sic] on his mortgage with a credit card cash advance. The Court finds that notwithstanding Greene's purported current financial condition, he had the ability to pay $50,000 when he made the above transactions and that he had $50,000 available on his home equity line of credit. On July 25, 2003, the District Court imposed sanctions in connection with the district court appeal against Greene in the amount of $10,000. The Court, having found that Greene had the ability to pay $50,000 and allowing for the imposition of district court

[24] The net amount of $154,413.89 sought by BSPA from Greene is in addition to Rule 8020 sanctions sought in connection with the proceedings in the District Court.

sanctions in the amount of $10,000, hereby awards BSPA $40,000 to be paid by Greene within 30 days from the date of this Order.

The Court is aware that in the Eleventh Circuit it is an abuse of discretion to impose joint and several liability for sanctions without considering each sanctioned party's individual ability to pay. *Martin v. Lamborghini,* 307 F.3d at 1337. Notwithstanding that ruling, the Court finds that it is appropriate to hold Michael E. Greene, P.A. and Michael E. Greene, Esq., jointly and severally liable for the sanctions imposed herewith. This case is different than *Martin* where three separate individuals were held jointly and severally liable for sanctions. In this case Michael E. Greene, Esq. owns one hundred percent of Michael E. Greene, P.A. Michael E. Greene, P.A., and Michael E. Greene, Esq. were equally culpable in this matter. It is not possible for the Court to separate the acts of the individual from the acts of the P.A., nor is it practical to attempt to separate the individual and the P.A's ability to pay under these circumstances.

The Court notes that pursuant to the movants' allocation of settlement proceeds, MHR received the full amount of sanctions sought in this matter. The Court's approval of the movants' settlement proceeds allocation in the amount of $59,873.26 in favor of BSPA in connection with the sanctions in this matter coupled with the Court's award of $40,000, results in BSPA receiving a substantial portion of the amount of sanctions sought by BSPA in this matter. As discussed above BSPA, a pro se litigant, is ineligible for either Rule 9011 or section 1927 sanctions because "one cannot 'incur' fees payable to oneself, fees that one is not obliged to pay." *Pickholtz*, 284 F.3d at 1375 (citations omitted). Nevertheless the Court is awarding sanctions

pursuant to the Court's inherent powers because Greene's misconduct necessitated BSPA's spending considerable time defending these proceedings. An award of sanctions pursuant to a Court's inherent powers is equitable in nature. Such an award should neither ruin the party sanctioned nor should it provide a windfall for the prevailing party. The Court believes that the amount awarded represents a fair resolution. It is a substantial amount with a "real bite" that Greene can actually pay and it provides reimbursement to BSPA for most of its direct costs albeit without provision for profits that otherwise might be considered excessive.

CONCLUSION

In conclusion the Court finds that Greene violated Rule 9011 and 28 U.S.C. § 1927. The Court finds overwhelming evidence of multiple violations of Greene's obligation to refrain from frivolous, vexatious litigation. His continuing and persistent assertion of meritless positions caused MHR and BSPA to expend significant resources and consumed an undue amount of the Court's time over the past year and a half.

The Court believes that it has imposed a sanction that will be adequate to deter Greene from similar conduct in the future, will compensate the movants for the burden that has been put upon them, yet will not be so burdensome on Greene so as to be impossible to fulfill and thus meaningless.

The movants, and the Court, made clear to Greene at all relevant times that he was risking substantial sanctions if he continued with frivolous and sanctionable

litigation tactics. Nevertheless, Greene persisted in asserting positions that were thoroughly rejected by this Court and affirmed by the District Court in summary fashion and by his own admission Greene categorically rejected efforts by counsel for MHR and BSPA to settle this matter. These positions were taken by LAI, on the advice of Greene, in callous disregard for the Court's processes, and the time and expenses it took to respond to the various proceedings initiated by LAI.

The Court takes no pleasure in imposing sanctions. However, sanctions are appropriately imposed in cases such as this one where the litigation conduct of an attorney cannot be justified after a full review of the relevant facts and circumstances.

Therefore with the Court having reviewed the submissions of the parties,, having heard the arguments and testimony and being otherwise fully advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Court hereby imposes sanctions against Michael E. Greene, Esq. and Michael E. Greene, P.A. for the benefit of MHR in the amount of $89,749.13 pursuant to Fed. R. Bankr. P. 9011, 28 U.S.C. § 1927, and the Court's inherent power. The Court simultaneously approves the allocation of settlement proceeds in the amount of $89,749.13 in satisfaction of the entire amount of sanctions imposed against Greene herewith so that Greene shall not be required to make any monetary payment to MHR in connections with these proceedings. This Court expresses no opinion as to whether or to what extent any remaining settlement proceeds or any

malpractice insurance proceeds should be applied as a credit for the benefit of Greene with respect to Rule 8020 sanctions as this is an issue to be determined by the District Court.

2. The Court hereby imposes sanctions against Michael E. Greene, Esq. and Michael E. Greene, P.A. for the benefit of BSPA in the amount of $99,873.26 pursuant to the Court's inherent powers. The Court simultaneously approves the allocation of settlement proceeds in the amount of $59,873.26 as a credit in favor of Greene for the sanctions imposed herewith. Michael E. Greene, Esq. and Michael E. Greene, P.A. shall be jointly and severally liable for payment of the net sanctions award of $40,000.00 which shall be due within thirty days from the date of this order. Interest will begin to accrue at the federal rate thirty days from the date of this order. This Court expresses no opinion as to whether or to what extent any remaining settlement proceeds or any malpractice insurance proceeds should be applied as a credit for the benefit of Greene with respect to Rule 8020 sanctions as this is an issue to be determined by the District Court.

DONE AND ORDERED in Fort Lauderdale, Florida, this 29th of July, 2003.

/s/ Paul Hyman
PAUL G. HYMAN, JR., Judge
United States Bankruptcy Court

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AUST

APPENDIX B

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-14096
Non-Argument Calendar

D.C. Docket No. 02-80746-CV-KLR & 01-33622 BKC-PG

LEASING ASSOCIATES, INC.,
a.k.a. Lai Trust,

Plaintiff,

MICHAEL E. GREENE,
MICHAEL E. GREENE, PA.,

Appellants,

versus

MHR INSTITUTIONAL
PARTNERS LP, MHS
CAPITAL PARTNERS LP,
ET AL.,

Defendants-Appellees,

BERGER SINGERMAN,

Interested Party-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(April 19, 2004)

Before BIRCH, DUBINA, and MARCUS, Circuit Judges.

PER CURIAM:

Michael Greene and his law firm, Michael E. Greene, P.A., (collectively, "Greene") appeal the district court's decision imposing sanctions under Fed. R. Bankr. P. 8020 and 28 U.S.C. § 1927 based on the court's finding that Greene's appeal from a bankruptcy court order was frivolous. On appeal, Greene argues that the district court violated his due process rights by imposing sanctions before considering his timely response brief against sanctions.[1] We review a district court's imposition of sanctions for an abuse of discretion. *See Thomas v. Tenneco Packaging Co. Inc.*, 293 F.3d 1306, 1319 (11th Cir. 2002).

Upon thorough review of the record, as well as careful consideration of the parties' briefs, we find no reversible error and affirm.

The parties are familiar with the underlying proceedings and we only summarize the relevant facts here. Greene served as counsel to Leasing Associates, Inc. ("LAI") in the underlying Chapter 11 bankruptcy proceedings and on appeal from the bankruptcy court to the district court. Appellee, Berger Singerman, PA. ("Berger Singerman"), represented the Chapter 11 debtor, U.S. Pool Corp. ("USPC"), and the debtor's lenders, MHR Institutional Partners LP, MHR Capital Partners LP, MHR Partners LP, and U.S. Pool Acquisition Corp. (collectively,

[1] Because we conclude that the district court did not abuse its discretion in sanctioning Greene after finding that his arguments had so little merit that they were frivolous, we need not, and do not, reach the merits of the arguments he asserted in the district court.

"MHR"), in the bankruptcy proceedings. MHR is also an appellee in this appeal.

Prior to the Chapter 11 proceedings, USPC and MHR had executed a Note Purchase Agreement ("NPA"), which provided that MHR was loaning USPC approximately $2.7 million and was securing its loan by a lien on substantially all of USPC's assets. On the day after it filed the Chapter 11 petition, USPC moved for authorization to sell substantially all of its assets free and clear of all liens, claims, interests, and encumbrances. Notably, all creditors, *including LAI*, received notice of a hearing on this motion. After the hearing, the bankruptcy court entered an order authorizing the sale ("Sale Order"). Only after entry of this order did LAI object to the authorization. LAI, represented by Greene, then filed an emergency Rule 60(b) motion to modify the Sale Order, arguing that the Sale Order prevented it from asserting its subordinated rights under the NPA. The bankruptcy court denied the motion, finding that LAI had made "a conscious decision" to wait to challenge the Sales Order and had not shown excusable neglect for not raising the subordination issue earlier, despite having notice of LAI's motion for authorization to sell its assets.

On the same day of the Rule 60(b) motion, LAI also filed an adversary proceeding for, *inter alia* contractual subordination, asserting rights pursuant to the NPA. In the adversary proceeding, MHR moved for summary judgment, arguing that (1) LAI had no enforceable rights under the NPA because the contract contained a "No Third Party Beneficiaries" provision, which specifically disclaimed any intention to create rights that would be enforceable by third parties; (2) even if there was a valid subordination of rights, MHR's rights, as a secured

creditor, would not be affected as to MHR's collateral; and (3) any claims that LAI might assert against MHR were barred under principles of claim preclusion based on LAI's failure to timely object to entry of the Sale Order and the denial of its Rule 60(b) motion.

In a 42-page opinion, the bankruptcy court granted MHR's motion after specifically addressing and rejecting each of LAI's arguments in opposition to summary judgment. The bankruptcy court first noted that the NPA's terms were "unambiguous" and "d(id] not permit the assertion of any subordination rights by LAI" because: (1) New York law, which was the applicable law under the NPA, allowed "no third party beneficiary" clauses; (2) the NPA did not contain provisions one would expect in a normal subordination agreement; (3) LAI's interpretation of the NPA would require the court to completely disregard the disclaimer clause; and (4) the NPA, when read in its entirety, could not be construed as creating enforceable subordination rights. The court also found that the Sale Order barred LAI's subordination claim, pursuant to principles of claim preclusion, and that LAI's remaining claims were mooted by the fact that it had no contractual rights, whatsoever, to assert a claim based on the NPA.

LAI appealed to the district court, challenging the bankruptcy court's entry of summary judgment. In its brief, LAI first argued that the bankruptcy court erred in finding that the NPA did not grant subordination rights. Second, LAI contended that under principles of New York contract construction, the NPA was ambiguous because it contained both a "no third party beneficiary" clause and subordination language, and LAI's inability to enforce its subordination rights rendered the NPA contrary to public policy. Third, LAI argued that the bankruptcy court's

interpretation of the NPA was harsh and inexplicable, especially in light of the fact that LAI relied on the subordination language in the NPA. Finally, LAI asserted that claim and issue preclusion did not apply because all pertinent issues had not been fully litigated by the bankruptcy court's order denying LAI's Rule 60(b) motion to modify the Sale Order.

After conducting oral argument, the district court affirmed the bankruptcy court's entry of summary judgment, stating that it "agree[d] with the excellent and well-reasoned opinion of the Bankruptcy Court and [found] that Appellant's claims [were] without merit."

Thereafter, USPC and Berger Singerman filed a motion for fees and costs, pursuant to Fed. R. Bankr. P. 8020 and 28 U.S.C. § 1927. Based on the district court's finding that LAI's claims on appeal were "without merit," USPC and Berger Singerman urged that damages and double costs were appropriate. They also highlighted that both the district and bankruptcy courts had previously informed LAI, in no uncertain terms, that, pursuant to both New York law and the unambiguous terms of the contract, it did not have subordination rights under the NPA. Finally, USPC and Berger Singerman asserted that the appeal was unreasonable and vexatious based on the bankruptcy court's finding that LAI had "strategically" delayed challenging the Sale Order, and that the whole adversary proceeding could have been avoided had LAI attended the sale hearing, of which it had been provided notice.

MHR also filed a motion for damages under either Fed. R. Bankr. P. 8020 or 28 U.S.C. § 1927, arguing, *inter alia*, that: (1) in pursuing the appeal, LAI had ignored

New York law that upheld "no third party disclaimer" clauses and cited irrelevant cases to argue that these clauses were unenforceable; and (2) LAI's contractual subordination claim was fundamentally flawed under New York law, which provides that subordination does not affect a secured creditor's rights in collateral. MHR highlighted that LAI had failed to articulate any reasonable basis for disregarding applicable New York law. MHR also asserted that LAI had not cited any cases or made any argument to identify the bankruptcy court's error in stating that LAI's claims were barred under claim preclusion.

The district court, prior to receiving LAI's response, which was filed on the same day that the district court issued its opinion, entered an order granting the motions for costs, attorneys' fees, and damages. Citing Fed. R. Bankr. P. 8020, the district court found LAI's appeal to be without merit and frivolous because the bankruptcy court had disposed of all issues in the litigation. The court then remanded to the bankruptcy court to determine the amount of the award.[2]

In its subsequently-filed response, LAI argued that it reasonably believed that it could succeed on the issues raised in the appeal, and that the motions for fees, costs and damages should be denied because the district court's description of LAI's claims as being "without merit," standing alone, was insufficient to support sanctions, and

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[2] On remand, the bankruptcy court found that MHR incurred $35,519 in fees and $10,700.30 in costs in connection with the appeal of the order granting summary judgment, and the court determined that Berger Singerman, P.A., which represented USPC, incurred $41,625 in fees and $4,988.48 in costs.

New York law had not "squarely" decided whether "no third party beneficiary" clauses were valid, so LAI reasonably had treated the disclaimer issue "soberly and candidly."

Thereafter, MHR and Singerman moved the district court to enter a final judgment. Greene responded by arguing, *inter alia*, that the district court had denied him due process in ruling on the sanctions motions before he had filed his response.

The district court entered final judgment. Regarding Greene's due-process claim, the district court admitted that it had not reviewed Greene's response before issuing the sanctions order, but that upon examining the response prior to entry of final judgment, the court had reached the same conclusion as to the frivolity of LAI's appeal because: (1) the NPA's disclaimer did not permit subordination rights; (2) MHR held a perfected security interest in the collateral; and (3) claim preclusion through the Sale Order and the Order denying the Rule 60(b) motion barred LAI's claims.

The district court further noted that the bankruptcy court had issued a well-reasoned and detailed summary judgment opinion, in which it concluded that LAI had *no* likelihood to succeed. on the merits and there were no serious issues on appeal. In the final judgment, the district court observed that although it had not considered Greene's response prior to ruling on the sanctions motion, "nothing in Greene's response raise[d] any doubt in the Court's mind as to the validity of its earlier conclusion" because Greene relitigated issues by maintaining that LAI had a claim for subordination rights. The court then concluded that "LAI's relentless pursuit of this action in

the face of abundant notice that it was utterly without merit is adequate grounds for the imposition of sanctions under Rule 8020 or 28 U.S.C. § 1927." However, the district court did partially grant Greene's request for a reduction in the sanctions award after determining that he was unable to pay the ordered amount The district court reduced the sanction amount to $10,000 and ordered Greene to pay this amount to the clerk of the court. This appeal followed.

Rule 8020 of the Federal Rules of Bankruptcy Procedure states:

> If a district court or bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the district court or bankruptcy appellate panel and *reasonable opportunity to respond*, award just damages and single or double costs to the appellee.

Fed. R. Bankr. P. 8020 (emphasis added). The commentary to Rule 8020 notes that this rule conforms to Fed. R. App. P. 38[3] because it "recognizes that the authority to award damages and costs in connection with frivolous appeals is the same for district courts sitting as appellate courts, bankruptcy appellate panels, and courts of appeals." Fed. R. Bankr. P. 8020, cmt. (1997). Rule 38 requires that before sanctions may be imposed, "the

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[3] Rule 38 of the Federal Rules of Appellate Procedure states:

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

person to be sanctioned *must have* notice and *an opportunity to respond.*" Fed. R. App. P. 38, ant. (1994) (emphasis added). "Attorneys and clients facing possible discipline under Rule 11 have interests qualifying for protection under the Due Process Clause of the Fifth Amendment." *Donaldson v. Clark*, 819 F.2d 1551, 1558 (11th Cir. 1987) (en banc). "Procedural due process requires notice and an opportunity to be heard before any governmental deprivation of a property interest." *Id.* (citing *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971)).

Here, in the final judgment, the district court stated that it *had* reviewed Greene's reponse [sic] and determined that his responsive arguments did not change the outcome on the sanctions motion:

> Procedural due process requires that a potential sanctionee be given notice and an opportunity to be heard prior to the imposition of sanctions. *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1294 (11th Cir. 2002). The potential sanctionee may respond orally or in writing, as both methods of response satisfy due process requirements. *Id.*, (citing *Donaldson v. Clark*, 819 F.2d 1551, 1559-60 (11th Cir. 1987)). As the Court issued its order deeming LAI's appeal frivolous prior to receiving Greene's response to the Rule 8020 motions, the Court reviewed Greene's response in conjunction with the preparation of this Order.
>
> Examination of Greene's response leave the Court with the film conviction that its initial determination of frivolity was warranted.

Dist. Ct. Final Judgment at 5. The district court then addressed each and every one of the arguments Greene asserted in his response to the motion for Rule 8020 sanctions. The court concluded:

> Although the Court failed to consider Greene's December 20, 2002 response in reaching its conclusion that the appeal was frivolous, nothing in Greene's response raises any doubt in the Court's mind as to the validity of its earlier conclusion. The Court had an adequate basis to assess the merits of the appeal and to conclude that it was frivolous. It reviewed both sides' appellate briefs, reviewed the Bankruptcy Court's Order, and considered LAI's position at oral argument. Greene's responsive pleading, in continuing to maintain that it had an arguable claim for subordination rights pursuant to the NPA, merely relitigates issues already decided against LAI by both this Court and the Bankruptcy Court. LAI's relentless pursuit of this action in the face of abundant notice that it was utterly without merit is adequate grounds for the imposition of sanctions under Rule 8020 and 28 U.S.C. § 1927.

Id. at 7.

We are satisfied that due process was satisfied in this case. While it is true that, pursuant to Rule 8020's plain language and the commentary to that Rule, the district court erred by failing to review Greene's response prior to entering the sanctions order, in light of the district court's subsequent consideration and unequivocal rejection of Green's responsive arguments prior to entry of final judgment, we simply cannot find that any such error could possibly have affected Greene's substantial rights. It is well-settled that due process guarantees "no particular

form of procedure; it protects substantial rights." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610, 94 S.D. 1895, 1901, 40 L. Ed. 2d 406 (1974) (internal quotation marks and citation omitted). "The very nature of due process negates any concept of inflexible procedures universally applicable to any imaginable situation." *Id.* (internal quotation marks and citation omitted). Simply put, based on our review of the record, the district court *did* consider Greene's arguments in response to the motions for sanctions. Accordingly, Greene can show no violation of his substantial rights, and, accordingly, cannot establish a procedural due process violation.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 02-80746-CIV-RYSKAMP

IN RE:

U.S. POOL CORP.,

Debtor.

_____/

LEASING ASSOCIATES, INC.
A/K/A LAI TRUST,

Appellant,

v.

U.S. POOL CORP., MHR INTERNATIONAL PARTNERS, LP, MHR CAPITAL PARTNERS LP, MHRM PARTNERS, LP AND US POOL ACQUISITION CORP.,

Appellees.

_____/

ORDER GRANTING APPELLEES' LIMITED MOTION TO CLARIFY FINAL JUDGMENT AND AMENDING FINAL JUDGMENT TO REQUIRE PAYMENT OF SANCTION TO APPELLEES

(Filed Sep. 17, 2003)

THIS CAUSE comes before the Court pursuant to Appellees' Limited Motion to Clarify the Court's July 25, 2003 Final Judgment, filed July 31, 2003 **[DE 62]**. Interested Party Michael E. Greene responded on August 15, 2003 **[DE 64]**. Appellees replied on August 29, 2003 **[DE 66]**. This motion is ripe for adjudication.

The Court entered an Order of Final Judgment in this matter on July 25, 2003 **[DE 61]** in which it ordered Greene to pay a reduced $10,000 sanction to the Clerk of Court instead of the Appellees based on Michael E. Greene and Michael E. Greene, P.A.'s (collectively, "Greene") inability to pay the $92,832.78 sanctions awarded against them in connection with this appeal. The final judgment stated that Appellees "have recovered more than twice their appellate costs and fees as a result of their settlement," and that because Appellees "have been made whole, they may not receive a windfall as a result of their settlement."

Appellees move for clarification of the Final Judgment on the grounds that the $250,000 settlement was not solely attributable to Appellees' appellate fees and costs, but was also attributable to the greater fees and costs incurred in defending Leasing Associates, Inc.'s actions in the Bankruptcy Court. Appellees note that the fees and costs they have incurred as a result of the combined actions exceed $250,000. Greene's response to the motion for clarification raises the issue of the value of malpractice claims being brought against him and is unrelated to the motion for clarification. The Court, being fully advised, hereby

ORDERS AND ADJUDGES that Appellees' Limited Motion to Clarify the Court's July 25, 2003 Final Judgment, filed July 31, 2003 **[DE 62]** is GRANTED. The Order is issued to clarify that Appellees have not been "made whole" in respect of Greene's sanctionable conduct in these combined proceedings from the previously received $250,000 settlement proceeds. Since Appellees have not been "made whole" in respect of Greene's sanctionable conduct in these combined proceedings, the Court hereby

AMENDS its July 25, 2003 Final Judgment and directs Greene to remit payment of the $10,000 sanction to BSPA and MHR.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 17th day of September, 2003.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:
All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 02-80746-CIV-RYSKAMP

IN RE:

U.S. POOL CORP.,

Debtor.
_____/

LEASING ASSOCIATES, INC.
a/k/a LAI TRUST,

Appellant,

v.

U.S. POOL CORP., MHR INTERNATIONAL PARTNERS, LP, MHR CAPITAL PARTNERS LP, MHRM PARTNERS, LP and US POOL ACQUISITION CORP.,

Appellees.
_____/

FINAL JUDGMENT

(Filed Jul. 25, 2003)

THIS CAUSE comes before the Court pursuant to Appellees' Motion for Entry of Final Judgment, filed May 22, 2003 **[DE 56]**. Interested Parties Michael E. Greene and Michael E. Greene, P.A. (collectively, "Greene") responded on June 9, 2003 **[DE 59]**. Greene requests, *inter alia*, a reversal of this Court's December 20, 2002 **[DE 38]** Order Awarding Sanctions, or, in the alternative, a reduction in the amount of the sanctions determined by the Bankruptcy Court. Appellees filed no reply. This motion is ripe for adjudication.

I. BACKGROUND

On June 17, 2000, the United States Bankruptcy Court for the Southern District of Florida entered a Memorandum Decision and Order granting summary judgment in favor of defendants MHR Institutional Partners LP, MHR Capital Partners LP, MHRM Partners PL and U.S. Pool Acquisition Corp. ("MHR") and U.S. Pool Corp ("USP") and denying the motion by Plaintiff Leasing Associates, Inc. ("LAI") to further amend its complaint to assert claims against USP's counsel, Berger Singerman, P.A. ("BSPA"). LAI appealed the June 17, 2002 decision to this Court. This Court heard oral argument on the appeal on November 20, 2002 and issued an order affirming the Bankruptcy Court's ruling the same day **[DE 29].**

MHR and BSPA filed separate motions for damages and costs, including attorneys' fees, against LAI and its counsel, Michael E. Greene, Esq. and Michael E. Greene, P.A. and Edward L. Rothberg, Esq. and his firm Weycer, Kaplan, Pulaski & Zuber, P.C. (collectively "Rothberg") on December 5, 2002. MHR moved for appellate fees and costs pursuant to Fed. R. Bankr. P. 8020 and 28 U.S.C. § 1927 **[DE 33].** MHR's Motion expressly sought damages against LAI, Greene and Rothberg, jointly and severally, including attorneys' fees and double costs. USP and BSPA moved for appellate fees and costs pursuant to Fed. R. Bankr. P. 8020 or, in the alternative, 28 U.S.C. § 1927 **[DE 32]**. BSPA's motion also sought all fees and costs it incurred against Greene and Rothberg.

On December 20, 2002 **[DE 38],** this Court entered an order concluding that the appeal was "without merit and frivolous" and granting both motions for costs, attorneys'

fees and damages. This Court remanded the matter to the Bankruptcy Court to determine the amount of the award.

On February 14, 2003, the Bankruptcy Court conducted a hearing to determine the amount of the award. The Bankruptcy Court combined the hearing on the Fed. R. Bankr. P. 8020 and 28 U.S.C. § 1927 motions with a hearing on USP's Fed. R. Bankr. P. 9011 motion for sanctions. Prior to the hearing, MHR and BSPA reached a $250,000 settlement with LAI and Rothberg,[1] which left the Bankruptcy Court with the sole task of determining the amount of the sanctions award against Greene.

By order dated March 27, 2003, the Bankruptcy Court found that MHR incurred $35,519.00 in fees and $10,700.30 in costs in connection with the appeal and that BSPA incurred $41,625.00 in fees and $4,988.48 in costs in connection with the appeal. The Bankruptcy Court awarded a total of $92,832.78 to BSPA and MHR. The Bankruptcy Court was not requested to and therefore did not rule on whether Greene should receive a setoff due to the settlement, presuming that "if it is appropriate the District Court will rule on this issue." On April 30, 2003, the Bankruptcy Court denied Greene's motion to amend its March 27, 2003 Order. As Greene has appealed neither the March 27, 2003 Order nor the April 30, 2003 Order, MHR and BSPA request that this Court enter judgment on the March 27, 2003 Order.

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[1] MHR and BSPA may allocate settlement proceeds at their discretion.

II. DISCUSSION

Greene objects to the motion for entry of final judgment on a variety of grounds. First, Greene requests that the Court vacate the order ruling that the appeal was frivolous and specify how he acted in bad faith in bringing the appeal. Additionally, Greene claims that the Court violated his right to due process in awarding sanctions prior to receiving his response to MHR and BSPA's initial sanctions motions. Second, Greene requests a reduction in the sanctions award based on BSPA and MHR's receipt of $250,000 from LAI and Rothberg, the fact that BSPA incurred attorneys' fees on a *pro se* basis, and his inability to pay the sanctions award. Finally, Greene requests that, if this Court does not reduce the amount of the award, that it enter a final order rather than a final judgment and stay execution of the award without bond, thereby allowing him to appeal without having to tender payment. The Court will address each of Greene's objections in turn.

1. Frivolity of the Appeal: The December 20, 2002 Order Awarding Sanctions

According to Fed. R. Bankr. P. 8020,

> If a district court or bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the district court or bankruptcy appellate panel and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Rule 8020 is the bankruptcy equivalent to Fed.R.App.P. 38, which addresses frivolous appeals from the district courts. Rule 38 provides that

> [i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

MHR and BSPA complied with Rule 8020 in that each filed separate motions for sanctions on December 5, 2002. Greene's response to the motions was therefore due on December 20, 2002. The Court entered its Order deeming the appeal frivolous and awarding sanctions prior to receiving Greene's response, which was also dated December 20, 2002. Greene argues that the Court's entering of the sanctions order prior to receiving his response violated his right to due process.

Procedural due process requires that a potential sanctionee be given notice and an opportunity to be heard prior to the imposition of sanctions. *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1294 (11th Cir. 2002). The potential sanctionee may respond orally or in writing, as both methods of response satisfy due process requirements. *Id.* (citing *Donaldson v. Clark*, 819 F.2d 1551, 1559-60 (11th Cir. 1987)). As the Court issued its order deeming LAI's appeal frivolous prior to receiving Greene's response to the Rule 8020 motions, the Court reviewed Greene's response in conjunction with the preparation of this Order.

Examination of Greene's response leaves the Court with the firm conviction that its initial determination of frivolity was warranted. On September 14, 2001, LAI filed a Rule 60(b) Motion to modify a Bankruptcy Court Sale

Order approving the sale of substantially all of USP's assets to MHR, which made a successful credit bid of $750,000 of its secured debt. LAI maintained that the Sale Order's Note Purchase Agreement ("NPA") allowed it to bring claims against MHR under a "subordination agreement." This argument was entirely unfounded. First, this Court and the Bankruptcy Court held that the NPA did not allow for subordination rights because it contained a "no third party beneficiaries" clause. Second, even if LAI were entitled to subordination rights under the NPA, the rights would be inapplicable to MHR's interest in collateral in which it held a perfected security interest. Finally, all claims by LAI were barred under claim preclusion via the Sale Order and Order denying the Rule 60(b) motion. In an effort to dissuade LAI from pursuing its meritless claims, MHR and BSPA served and filed motions for Fed. R. Bankr. P. 9011 sanctions, the bankruptcy equivalent to Fed. R. Civ. P. 11.

The Bankruptcy Court, in a superbly well reasoned and detailed opinion, found each of LAI's claims meritless. Notably, the Bankruptcy Court ruled that

> LAI has not attempted to present any interpretation of the NPA that would give LAI enforceable subordination rights while also giving meaning to the 'No Third Party Beneficiaries' provision and the other provisions referenced above.

(June 17, 2002 Bankruptcy Order, p. 24.) The Bankruptcy Court also noted that Greene mischaracterized the record in support of his argument that the "no third party beneficiaries" clause did not preclude LAI's claims:

> In all of the papers it has filed with the Court, LAI has never even attempted to explain what

> this language [the "no third party beneficiaries clause"] otherwise could mean. Indeed, it has pretended that the language does not exist, omitting it from the citations in its pleadings, and repeatedly – inaccurately – claiming in its pleadings that 'MHR had agreed in the NPA to subordinate its secured-creditor status to that of LAI.'

Id. at 27. The Bankruptcy Court found that LAI possessed "no likelihood of success on the merits" and that "there isn't a serious issue on appeal."

Despite the Bankruptcy Court's unequivocal disposal of LAI's claims and Greene's awareness of the Rule 9011 motions, LAI appealed to this Court. This Court heard oral argument on the appeal on November 20, 2002 and affirmed the Bankruptcy Court the same day.

An appeal is frivolous under Rule 8020 when "the result is obvious" or the appellant's argument is "wholly without merit." *In re Property Movers, L.L.C.*, 31 Fed.Appx. 81, 84 (4th Cir. 2002) (quoting *Williams v. United States Postal Service*, 873 F.2d 1069, 1075 (7th Cir. 1989)). *See also Sun v. Forrester*, 939 F.2d 924, 925 (11th Cir. 1991) (lawsuit is frivolous when it is not "capable of being convincingly argued" and "plaintiff's realistic chances of ultimate success are slight"). Sanctions are especially appropriate when the appellant has notice of the frivolousness of its arguments. *In re Maloni*, 282 B.R. 727, 732 (1st Cir. B.A.P. 2002). 28 U.S.C. § 1927 allows imposition of liability against counsel for conduct resulting in excessive costs: "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys fees reasonably incurred because of such conduct."

Although the Court failed to consider Greene's December 20, 2002 response in reaching its conclusion that the appeal was frivolous, nothing in Greene's response raises any doubt in the Court's mind as to the validity of its earlier conclusion. The Court had an adequate basis to assess the merits of the appeal and to conclude that it was frivolous. It reviewed both sides' appellate briefs, reviewed the Bankruptcy Court's order, and considered LAI's position at oral argument. Greene's responsive pleading, in continuing to maintain that it had an arguable claim for subordination rights pursuant to the NPA, merely relitigates issues already decided against LAI by both this Court and the Bankruptcy Court. LAI's relentless pursuit of this action in the face of abundant notice that it was utterly without merit is adequate grounds for the imposition of sanctions under Rule 8020 and 28 U.S.C. § 1927.

2. Reduction in Sanctions Award

Greene requests a reduction of the $92,832.78 sanctions award because he lacks the ability to pay the award and because MHR and BSPA received $250,000 in their settlement with LAI and Rothberg.

The Bankruptcy Court based the amount of the sanctions award on appellees' actual fees and costs, noting that courts awarding sanctions under Rule 38 have found that the proper measure of damages is the actual fees and costs incurred. *Sun-Tek Industries, Inc. v. Kennedy Sky-Lites, Inc.*, 865 F.2d 1254, 1255 (Fed. Cir. 1989) ("Ordinarily the only inquiry in determining the propriety of the amount of attorney fees to be paid as damages by an appellant who has filed a frivolous appeal is whether the appellee actually incurred the fees sought in defending

against the appeal."). Though not required to do so, the Bankruptcy Court also ruled that the amount of the sanctions award was reasonable given LAI's relentless pursuit of its meritless claims.

Although *Sun-Tek* holds that actual costs and fees can form the basis for an award under Rule 38, it allows courts some leeway in determining the amount of the sanctions award. The *Sun-Tek* holding is limited in that it "intimate[s] no opinion on whether, in what circumstances and to what an extent, a reduction of attorney fees and costs incurred in defending against a frivolous appeal would be appropriate." *Id.* The Eleventh Circuit requires that courts consider an attorney's ability to pay a sanctions award assessed against him. Nevertheless, the sanctionee must still feel the impact of the sanction:

> Sanction orders must not involve amounts that are so large that they seem to fly in the fact [sic] of common sense, given the financial circumstance of the party being sanctioned. . . . [S]anctions must never be hollow gestures; their bite must be real. For the bite to be real, it has to be a sum that the person might actually pay. A sanction which a party clearly cannot pay does not vindicate the court's authority because it neither punishes or deters.

Martin v. Automobili Lamborghini Exclusive, Inc., 307 F.3d 1332, 1337 (11th Cir. 2002) (internal citation omitted). *See also Baker v. Alderman*, 158 F.3d 516, 528 (11th Cir. 1998) (imposition of Rule 11 sanctions "should only be done with sensitivity to the facts of the case and to the party's financial situation.").

The Court has examined Greene's financial records and rules that he is unable to pay a sanctions award equal

to appellees' actual appellate costs and fees. Greene's law practice has not been lucrative of late; Greene made only $3,634.73 during the first quarter of 2003. Although Greene owns a home worth nearly $200,000, he has only $15,000 available in home equity credit. As of January 31, 2003, Greene's savings amounted to a checking account containing $6,767.45. Greene and his spouse have approximately $3,000 in individual retirement accounts, and Greene has $121.38 in a brokerage account. LAI is suing Greene for malpractice, and Greene's malpractice insurer has verbally informed him that it will not provide coverage. Greene and his wife are 61 and 60, respectively.

Since Greene's financial condition renders him unable to pay a sanctions award equal to appellees' actual costs and attorneys' fees, a reduction in the amount of the sanction is appropriate. The Court hereby reduces the Bankruptcy Court's sanction against Greene to the amount of $10,000. The Court finds that this sanctions award is an amount that Greene "might actually pay" and therefore will deter others from engaging in similar conduct. *Martin*, 307 F.3d at 1337.

The Court further rules that this sanctions award shall be payable to the Clerk of Court rather than to MHR and BSPA. In addition to their deterrent and punitive functions, sanctions also serve to make injured individuals whole. *Hutto v. Finney*, 437 U.S. 678, 690, 98 S.Ct. 2565, 2573 n.14 (1978) (awards of attorneys' fees "makes the prevailing party whole for expenses caused by his opponent's obstinacy."). MHR and BSPA have recovered more than twice their appellate costs and fees as a result of their settlement. As MHR and BSPA have been made whole, they may not receive a windfall as a result of the sanction imposed on Greene. The Court therefore orders

Greene to tender payment of the $10,000 sanction, not to MHR and BSPA, but to the Clerk of Court. As this Court has reduced the amount of the original sanctions award against Greene, Greene's request for a final order rather than a final judgment is denied.

IV. CONCLUSION

Upon consideration of the motions, supplemental filings and the proceedings in the Bankruptcy Court, this Court hereby

ORDERS AND ADJUDGES that Appellees' Motion for Entry of Final Judgment, filed May 22, 2003 **[DE 56]** is GRANTED. FINAL JUDGMENT is hereby entered for Appellees MHR Institutional Partners, LP; MHR Capital Partners, LP; MHRM Partners, LP; and Berger Singerman, P.A. and against Michael E. Greene, Esq. and Michael E. Greene, P.A. on the Bankruptcy Court's March 27, 2003 Order Determining Amount Pursuant to District Court's Combined Order Granting Appellees' Motions for Costs and Damages, with the modification that the amount of the sanction reduced to $10,000 and shall be payable to the Clerk of Court. It is hereby

ORDERED AND ADJUDGED that Greene shall be taxed in the amount of $10,000 pursuant to Rule 8020 and 28 U.S.C. § 1927, payable to the Clerk of Court. Let execution issue forthwith.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 25th day of July, 2003.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided
The Honorable Paul G. Hyman, Jr.
Michael E. Greene, Esq.
David L. Rosendorf, Esq.
Paul S. Singerman, Esq.

Attorney Singerman is directed to serve a conformed copy of this Order on all interested parties not listed above.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

Case No.: 02-80726-CIV-RYSKAMP

IN RE:

U.S. POOL CORP.,

Debtor.

_____/

LEASING ASSOCIATES, INC.
A/K/A LAI TRUST,

Appellant,

v.

U.S. POOL CORP., MHR
INTERNATIONAL PARTNERS,
LP, MHS CAPITAL PARTNERS LP,
MHRM PARTNERS, LP and
US POOL ACQUISITION CORP.,

Appellees.

_____/

COMBINED ORDER GRANTING APPELLEES' MOTIONS FOR COSTS AND DAMAGES AND DENYING APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE APPEAL

(Filed Dec. 20, 2002)

THIS CAUSE comes before the Court pursuant to Appellees U.S. Pool Corp ("USP") and Berger Singerman, P.A.'s ("Berger Singerman") December 5, 2002 **[DE 32]** Motion for Appellate Costs and Attorneys' Fees pursuant to F.R.B.P. 8020, or, alternatively, 28 U.S.C. § 1927 and Appellees MHR Institutional Partners LP, MHR Capital

Partners LP, MHRM Partners LP, and U.S. Pool Acquisition Corp.'s ("MHR") December 5, 2002 **[DE 33]** Motion for Damages and Costs pursuant to F.R.B.P. 8020 and 28 U.S.C. § 1927.

I. Award of Costs and Fees

The Court heard this appeal on November 20, 2002 and affirmed in all respects the order of the Honorable Paul G. Hyman of the United States Bankruptcy Court **[DE 29]**. F.R.B.P. provides

> If a district court or bankruptcy appellant panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the district court or bankruptcy appellate panel and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

The Court finds that the appeal in this case is without merit and frivolous, as the Order of the Bankruptcy Court disposed of all issues in this litigation. Wherefore, the Court hereby grants Appellees' Motions for costs, attorneys' fees and damages.

II. Motion for Extension to Appeal

Appellant filed a motion for an extension of time to file notice of appeal on December 13, 2002 **[DE 34]**. Appellant appears concerned that, unless it receives an extension, it will have to file two appeals: one from the order on the merits, and one from the order granting the fees award. Appellant also contends that a notice of appeal will divest this Court of jurisdiction over the fees motion. The

Court notes that a filing of a notice of appeal will not divest it from jurisdiction over the fees issue. An appeal on the merits will not "divest the district court of jurisdiction over collateral matters." *Doe v. Bush,* 261 F.3d 1037, 1064 (11th Cir. 2001), *cert. denied,* ___ U.S. ___ (2002) (citations omitted). Requests for attorneys' fees are collateral matters. *Baker v. Alderman,* 158 F.3d 516, 523 (11th Cir. 1998). The Court hereby denies Appellant's motion for an extension of time to file an appeal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

Case No.: 02-80746-CIV/RYSKAMP

IN RE:

U.S. POOL CORP.,

Debtor

_____/

LEASING ASSOCIATES, INC.
A/K/A LAI TRUSTS,

Appellant,

v.

U.S. POOL CORP., MHR
INTERNATIONAL PARTNERS,
LP, MHS CAPITAL PARTNERS LP,
MHRM PARTNERS, LP and
US POOL ACQUISITION CORP.,

Appellees.

_____/

ORDER AFFIRMING BANKRUPTCY COURT IN ALL RESPECTS

(Filed Nov. 20, 2002)

THIS CAUSE comes before the Court pursuant to Appellant LAI Trust's appeal of the United States Bankruptcy Court's (1) Memorandum Decision and Order Granting MHR's Motion for Summary Judgment on the Amended Complaint, Denying LAI's Cross-Motion for Summary Judgment, and Denying LAI's Motion to Further Amend the Complaint, entered June 17, 2002, (2) Final Judgment entered June 19, 2002, (3) March 12, 2002

rulings limiting information necessary for a privilege log and sustaining an objection to answering a deposition question, and (4) January 18, 2002 Order granting MHR's Motion to Strike Demand for Jury Trial.

The Court heard oral argument on this appeal on November 20, 2002 and has reviewed the briefs and the pertinent portions of the record. The Court agrees with the excellent and well-reasoned opinion of the Bankruptcy Court and finds that Appellant's claims are without merit. Accordingly, it is hereby

ORDERED AND ADJUDGED that each ruling of the Bankruptcy Court is AFFIRMED IN ITS ENTIRETY.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 20 day of November, 2002.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT COURT

Copies provided:
Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:	CASE NO.: 01-33622-BKC-PGH
U.S. Pool Corp.,	CHAPTER 11
Debtor.	
_____/	
Leasing Associates, Inc. a/k/a LAI Trust,	
Plaintiff,	ADV. NO.: 01-3196-BKC-PGH-A
v.	
U.S. Pool Corp., MHR Institutional Partners, LP, et al.	
Defendants.	
_____/	

MEMORANDUM DECISION AND ORDER GRANTING MHR'S MOTION FOR SUMMARY JUDGMENT ON AMENDED COMPLAINT, DENYING LAI'S CROSS-MOTION FOR SUMMARY JUDGMENT, AND DENYING LAI'S MOTION TO FURTHER AMEND COMPLAINT

This matter came before the Court on December 10, 2001, upon MHR Institutional Partners LP, MHR Capital Partners LP, MHRM Partners LP, and U.S. Pool Acquisition Corp.'s (collectively, "MHR") *Motion for Summary Judgment on Amended Complaint* ("Summary Judgment Motion"). The Summary Judgment Motion seeks the entry of summary judgment on all counts of the Amended Complaint filed by Plaintiff Leasing Associates, Inc. a/k/a LAI Trust ("LAI") on November 30, 2001, which asserts

claims for contractual subordination (Count I), equitable subordination (Count II), breach of fiduciary duty (Count III), and misrepresentation (Count IV). The issues have been fully briefed by the parties.

The Court has considered the Summary Judgment Motion, the supporting materials, the joinder and other supporting papers filed by the Debtor and Defendant U.S. Pool Corp. ("US Pool"), the various papers and cross-motion filed by LAI in response, the affidavits, depositions, and other materials filed by the parties, and the record in this action and in the main bankruptcy case. Having reviewed and considered the pleadings and the record, the Court finds that there is no genuine dispute as to any material fact and that MHR and US Pool are entitled to judgment as a matter of law on all counts of the Amended Complaint.

First, as to LAI's contractual subordination claim, the unambiguous terms of the Note Purchase Agreement on which LAI relies do not permit the assertion of any subordination rights by LAI with respect to MHR's acquisition of the assets of US Pool through a credit bid of its secured debt. As a result, MHR is entitled to judgment as a matter of law, and accordingly the Court will also deny LAI's cross-motion for summary judgment on Count I of the Complaint.

This ruling by itself disposes of the remaining claims, since if LAI had no enforceable subordination rights in the first place, it could not have been injured by any of the supposed inequitable conduct, breaches of fiduciary duty or misrepresentations which LAI asserts in the remaining counts of the Amended Complaint. In any event, LAI's remaining claims are all barred under principles of res

judicata and/or collateral estoppel as a result of this Court's entry of the order approving the sale of US Pool's assets to MHR, and the orders denying LAI's requests to modify or vacate that sale order under Fed.R.Civ.P. 60(b) based on LAI's claims of, among other things, misconduct by the opposing parties. Accordingly, there is no relief which could possibly be granted on LAI's remaining claims, which have been vigorously disputed by MHR and US Pool.

The Court also will deny LAI's *Renewed Motion of Leasing Associates, Inc. for Leave of* Court *to Further Amend its Amended Complaint* ("Motion to Further Amend") since, based on the ruling contained herein, any such amendment would be futile.

UNDISPUTED FACTS

The Main Case

An extended discussion of the procedural history of the main bankruptcy case is necessary, because many of the issues raised in this adversary proceeding have already been the subject of litigation and final orders entered in the main case.

US Pool filed a voluntary Chapter 11 petition on July 9, 2001 (MCP#1).[1] The Plaintiff, LAI, is a vehicle lessor which leased vehicles to US Pool pursuant to a Vehicle Lease Agreement executed November 9, 1998 and a Vehicle Lease Agreement executed November 29, 1999

[1] The Court will refer to the court paper number of pleadings in the main bankruptcy case with "MCP#___", and pleadings in the adversary proceeding with "ACP#___".

(ACP#1, ¶ 113-14). Defendants MHR Institutional Partners LP, MHR Capital Partners LP and MHRM Partners LP are secured lenders of US Pool through a $2.7 million Secured Convertible Note Purchase Agreement (the "NPA") executed by US Pool and MHR on February 4, 2000, pursuant to which US Pool's debt to MHR is secured by a lien on substantially all the assets of US Pool (ACP#38, Ex. "A").[2] MHR filed a UCC-1 Financing Statement on February 22, 2000 perfecting its lien on the assets of US Pool (ACP#38, Ex. "B"). On May 31, 2001 MHR lent an additional $80,700 to US Pool pursuant to a First Supplemental Agreement (ACP#38, Ex. "C").

On July 10, 2001 US Pool filed its *Debtor's Motion for Entry of Order Approving Competitive Bidding and Sale Procedures* ("Bidding Procedures Motion") (MCP#7) and *Debtor's Motion for an Order Authorizing Sale of Substantially All of the Debtor's Assets Free and Clear of All Liens, Claims, Interests and Encumbrances Pursuant to 11 U.S.C. § 363(b), (f) and (k)* ("Sale Motion") (MCP#9), both of which were served on LAI. The Bidding Procedures Motion, among other things, sought confirmation that MHR as a secured creditor would be permitted to credit bid all or any portion of its secured debt at the proposed sale of US Pool's assets.

On July 13, 2001 the Court entered an *Agreed Order Granting Debtor's Emergency Motion of Debtor for an Order Directing LAI Trust to Immediately Provide Vehicle Registration Stickers and Other Relief*, which authorized

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[2] Defendant U.S. Pool Acquisition Corp. ("USPAC") is an entity formed by the other MHR entities for the purpose of taking an assignment of their secured claim and making a credit bid at the sale of US Pool's assets, as described in greater detail herein.

the rejection under 11 U.S.C. § 365 of 25 vehicle leases between US Pool and LAI (MCP#17). By order dated August 15, 2001 the Court authorized US Pool's rejection of an additional 19 LAI vehicle leases (MCP#54). On September 13, 2001 LAI filed a Closed End Lease Proof of Claim and Open End Lease Proof of Claim (Claims Register, Claim Nos. 20, 21) and on September 26, 2001 filed amended proofs of claim asserting rejection damages totaling $303,436.71 (Claims Register, Claim Nos. 22, 23).

On July 23, 2001 the Court entered an *Order Granting Debtor's Motion for Entry of Order Approving Competitive Bidding and Sale Procedures* ("Bidding Procedures Order"), which among other things authorized MHR to credit bid its secured debt at the sale (MCP#33). The Bidding Procedures Order was served on LAI (MCP#36).

On August 27, 2001, the Court entered an *Order Granting Debtor's Motion for an Order Authorizing Sale of Substantially All of the Debtor's Assets Free and Clear of All Liens, Claims and Encumbrances Pursuant to 11 U.S.C. § 363(b), (f) and (k)* ("Sale Order") which, pursuant to a hearing conducted on August 22, 2001, confirmed USPAC, as assignee of MHR, as the successful bidder in the purchase of substantially all of US Pool's assets with a credit bid of $750,000 (MCP#59). The Sale Order also was served on LAI (MCP#62). The Sale Order contains the following findings and provisions:

- "[T]he Buyer [USPAC, as assignee of MHR] has made a substantial, fair and reasonable offer to acquire the Purchased Assets in good faith pursuant to 11 U.S.C. § 363(m);"

- "[T]he sale process conducted by the Debtor, as required by Section 363 of the Bankruptcy Code, has been fair, open and reasonable;"
- "[T]he agreement [for USPAC's purchase of US Pool's assets] was negotiated, proposed and entered into by the parties without collusion, in good faith, and from arm's length bargaining positions;"
- "The Buyer is a buyer in good faith of the Purchased Assets under Section 363(m) of the Bankruptcy Code and, as such, is entitled to the protections afforded thereby;"
- "The transfer of title to the Purchased Assets, pursuant to the Agreement, is in all respects a valid, legal and effective transfer of the Purchased Assets of the Debtor's estate to the Buyer, free and clear of all liens, claims, interests and encumbrances under Section 363(f) of the Bankruptcy Code;"
- "Pursuant to Section 363(f) of the Bankruptcy Code, the sale of the Purchased Assets to the Buyer pursuant to this Agreement is and shall be free and clear of all liens, claims, encumbrances and interests of every kind and nature. All persons and entities . . . holding liens or claims against the Debtor or the Debtor's estate arising on or before the Closing Date, or out of events occurring before the Closing Date, of any kind and nature with respect to the Purchased Assets, hereby are barred from asserting such liens and Claims of any kind and nature against the Buyer, its successors or assigns, or the Purchased Assets;"

- "The Buyer is a purchaser in good faith within the meaning of Section 363(m) of the Bankruptcy Code, and is entitled to all the protections afforded by such section. Without limiting the foregoing, in the absence of a stay pending appeal, if the Buyer elects or is required to close under the Agreement at any time after the entry of this Sale Order, then, the Buyer shall be entitled to the protections of Section 3653(m) of the Bankruptcy Code if this Sale Order or any authorization contained herein is reversed or modified on appeal."

On September 14, 2001 (18 days after the Sale Order was entered), LAI filed an *Emergency Motion to Modify Order Granting Debtor's Motion for an Order Authorizing Sale of Substantially All of the Debtor's Assets Free and Clear of All Liens, Claims, Interests and Encumbrances Pursuant to 11 U.S.C. § 363(b), (f) and (k) and Request for Emergency Hearing ("Rule 60(b) Motion"). (MCP#63).*[3] In the Rule 60(b) Motion, LAI alleged that "the LAI claims are senior to the claims of MHR," and that LAI failed to object to the entry of the Sale Order because it expected to assert its interests in the proceeds of a sale and was surprised to learn that an assignee of MHR was the successful bidder with a credit bid. LAI accordingly sought relief from the Sale Order to: (a) require the purchaser (MHR) to pay the purchase price for US Pool's assets in cash; (b) require MHR to pay a portion of the purchase price sufficient to protect LAI's interest in cash; (c) provide for the assets to be sold to a third party for cash; or (d)

[3] On the same date, LAI also filed the Complaint commencing this adversary proceeding, discussed in greater detail later.

provide for the assets to be sold subject to a lien in favor of LAI to secure its alleged subordination rights.

The hearing on the Rule 60(b) Motion originally was scheduled for September 19, 2001 (MCP#67) but was continued to October 12, 2001 (MCP#68). On October 12, 2001, the Court conducted a hearing on the Rule 60(b) Motion (MCP#87). At the hearing, LAI called its counsel, Edward Rothberg, as a witness. Mr. Rothberg testified as to his communications with US Pool's counsel, Leslie Cloyd, regarding his inquiry on August 7, 2001 as to a document "which effectively subordinates [MHR's] debt to the claim of Leasing Associates," and Ms. Cloyd's e-mail response on the morning of August 22, 2001 that "I received a fax while I was out on vacation requesting a subordination between MHR and Leasing Associates. I am not aware of such a document. Wouldn't your client have it and be a party? [A]s far as I know, MHR is in first place on all assets except leased assets, which would be in the leasing company's name." Mr. Rothberg also testified as to his subsequent actions in pursuing LAI's alleged subordination rights.

LAI cross-examined Ms. Cloyd with respect to her knowledge of any subordination agreement between MHR and LAI and any other documents which would provide for subordination of MHR's claim to LAI. The Court permitted extended inquiry as to Ms. Cloyd's state of mind in light of the provision within Rule 60(b) for fraud. (MCP#87, P. 96 L. 18-25). In closing argument, LAI asserted that it was entitled to relief under Rule 60(b) for "surprise, inadvertence, excusable neglect, or for fraud" (MCP#87, P. 106 L. 14-18).

After conducting an evidentiary hearing, the Court denied LAI's Rule 60(b) Motion, upon finding that LAI's failure to timely oppose the entry of the Sale Order was the result of a conscious decision rather than any excusable neglect (MCP#87, P. 121 L. 13-20). An Order was entered on October 22, 2001 incorporating the Court's findings ("Order Denying Rule 60(b) Motion") (MCP#86).

On October 15, 2001, LAI filed an *Emergency Motion of Leasing Associates, Inc. to Reconsider Decision Denying Rule 60(b) Motion or in the Alternative for Stay Pending Appeal* ("Motion for Reconsideration") (MCP#81). In the Motion for Reconsideration, LAI argued that it was entitled to relief under Rule 60(b) (3) "because of misrepresentations made by the Debtor's counsel in connection with this matter." LAI now argued that the reason it failed to timely oppose the Sale Order was because US Pool's counsel supposedly misrepresented the non-existence of documents in response to LAI's informal inquiry on August 7, 2001 (MCP#81, ¶ 13-15).

On October 19, 2001 the Court conducted a hearing on LAI's Motion for Reconsideration, and announced its findings at the hearing that: (1) "there was a conscious decision made not to object to the sale and not to file a motion to reconsider within the time period provided for under Rule 59;" (2) "there was no evidence of any conspiracy between the creditor and the debtor;" and (3) "there was no fraud" (MCP#91). On October 23, 2001 the Court entered an *Order Denying Emergency Motion* of *Leasing Associates, Inc. to Reconsider Decision Denying Rule 60(b) Motion or in the Alternative for Stay Pending Appeal*, consistent with its ruling ("Order Denying Reconsideration") (MCP#88).

On October 19, 2001 LAI filed a Notice of Appeal of the Order Denying Rule 60(b) Motion and the Order Denying Reconsideration (MCP#89). On December 17, 2001 (the same day it conducted oral argument on the appeal), the United States District Court for the Southern District of Florida entered an *Order Affirming Bankruptcy Court's Orders*, in which it affirmed in full the Order Denying Rule 60(b) Motion and the Order Denying Reconsideration (MCP#124). LAI subsequently appealed to the United States Court of Appeals for the Eleventh Circuit, but then on January 4, 2002 voluntarily dismissed the appeal.

The parties have stipulated that the Order Denying Rule 60(b) Motion and the Order Denying Reconsideration are final judgments on the merits rendered by a court of competent jurisdiction on matters in which LAI, US Pool and MHR all were parties (ACP#56). The Sale Order itself was never the subject of any appeal and likewise is a final order.

On March 15, 2002 the case was converted from Chapter 11 to a case under Chapter 7 with US Pool's consent (MCP#156).

The Adversary Proceeding

This adversary proceeding was commenced by LAI's filing of a Complaint against US Pool and against MHR on September 14, 2001 (ACP#1). The Complaint filed September 14, 2001 was a one-count complaint seeking to enforce a purported subordination agreement. The relief requested by LAI was that the Court enter a judgment declaring MHR's claim to be subordinated to the claim of LAI, and that any funds or other consideration payable to

MHR be instead paid to LAI until LAI's claim was paid in full.

On November 5, 2001 LAI filed a *Motion of Leasing Associates, Inc. for Leave of Court to Amend Complaint* ("Motion to Amend") in order to assert additional claims against MHR and US Pool for equitable subordination, breach of fiduciary duty and misrepresentation (ACP#9). The Motion to Amend was granted at a hearing on November 28, 2001 and an order was entered December 5, 2001 (ACP#24). LAI's Amended Complaint was filed November 30, 2001 (ACP#22). The Amended Complaint in Count I again sought a judgment declaring MHR's claim to be subordinated to LAI's claim, and in each of Counts I through IV also sought judgment against each of the MHR entities in the amount of LAI's claims with respect to its leases.

On December 10, 2001, MHR filed its Summary Judgment Motion (ACP#37), seeking the entry of summary judgment on all counts of LAI's Amended Complaint pursuant to Fed.R.Civ.P. 56, as incorporated by Fed.R.Bankr.P. 7056, together with MHR's *Notice of Filing Materials in Support of Motion for Summary Judgment on Amended Complaint* (ACP#38). On December 19, 2001 the Court entered an Order setting a briefing schedule for filing of responses, replies, and a stipulation of undisputed facts on the Summary Judgment Motion (ACP#44). On January 3, 2002, US Pool filed a *Limited Joinder in Motion for Summary Judgment on Amended Complaint, Filed by Defendants, MHR Institutional Partners LP, MHR Capital Partners LP and MHRM Partners LP* (ACP#49).

Also on January 3, 2002, LAI filed its *Memorandum in Opposition to MHR's Motion for Summary Judgment*

and Plaintiff LAI's Cross-Motion for Summary Judgment on Count 1 ("Opposition") (ACP#50). LAI also filed affidavits of Ronald D. Janak of LAI (ACP#52), Edward L. Rothberg, counsel to LAI (ACP#53), and Michael E. Greene, local counsel to LAI (ACP#51) in support of their Opposition. LAI subsequently filed with the Court the depositions of Richard Andron of US Pool (ACP#60), Charles W. Throckmorton, counsel to MHR (ACP#61), Mark Rachesky of MHR (ACP#66), Hal Goldstein of MHR (ACP#67), and Leslie G. Cloyd, counsel to US Pool (ACP#106).

On January 14, 2002, MHR filed and served its *Reply Memorandum in Support of Motion for Summary Judgment on Amended Complaint* (ACP#63). US Pool filed its *Reply Memorandum in Support of MHR's Motion for Summary Judgment on Plaintiff's Amended Complaint and in Opposition to LAI's Memorandum in Opposition* to *MHR's Motion for Summary Judgment and Plaintiff's LAI's Cross-Motion for Summary Judgment* on January 16, 2002 (ACP#64).

The parties submitted a *Joint Stipulation of Facts in Connection with MHR's Motion for Summary Judgment on Amended Complaint* on January 14, 2002 (ACP#56).

On March 1, 2002, LAI filed a *Motion for Leave to Supplement LAI's Response to MHR's Motion for Summary Judgment* ("Motion to Supplement") (ACP#82), seeking permission to supplement its briefs in response to the Summary Judgment Motion.[4] On March 14, 2002 the

[4] Shortly thereafter, on March 6, 2002, LAI filed its Motion to Further Amend, by which it sought leave to join Berger Singerman, counsel to US Pool, as a defendant to the breach of fiduciary duty and

(Continued on following page)

Court granted *LAI's* Motion to Supplement its summary judgment response, giving LAI until March 29, 2002 to supplement its response, and defendants an additional ten days thereafter to reply to any supplemental response (ACP#99).

LAI filed its *Plaintiff LAI's Supplement to Memorandum in Opposition to MHR's Motion for Summary Judgment* on April 2, 2002 (ACP#114). MHR, pursuant to an agreed extension, filed and served its *Reply to LAI's Supplement to Memorandum in Opposition to MHR's Motion for Summary Judgment* on April 15, 2002 (ACP#123), and then filed an Amended Reply and Exhibits on April 18, 2002 (ACP#125). On April 22, 2002, MHR filed the deposition transcripts of Ronald D. Janak of LAI (ACP#127) and Edward L. Rothberg, counsel to LAI (ACP#129).

At a hearing before this Court on May 8, 2002 (ACP#142), and again on May 22, 2002, the parties agreed that the Summary Judgment Motion had been fully briefed and was ripe for adjudication, although after this Court announced its preliminary ruling on May 22 LAI argued that the Court should consider its Motion to Further Amend before considering summary judgment. That argument will be addressed herein.

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misrepresentation counts (ACP#87). It then withdrew the Motion to Further Amend in response to service of a motion by Berger Singerman for sanctions under Fed.R.Bankr.P. 9011 (ACP#112). LAI then renewed the Motion to Further Amend on April 3, 2002 (ACP#115).

DISCUSSION

Summary Judgment Standard

Under Fed.R.Civ.P. 56, as incorporated by Fed.R.Bankr.P. 7056, summary judgment shall be granted if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Once the moving party identifies those portions of the record that demonstrate the absence of a genuine issue of material fact, any opposing party must set forth specific facts showing a genuine issue for trial, and may not rely on mere allegations or denials. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed 2d 202 (1986); *Celotex Corp. v. Catreet*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Summary judgment is appropriate on matters of law such as the construction of a contract, *see, e.g., B-M-G Investment Co. v. Continental/Moss Gordin, Inc.*, 437 F.2d 892 (5th Cir. 1971), *cert. denied*, 402 U.S. 989, 91 S.Ct. 1668, 29 L.Ed.2d 154 (1971); *Central Nat'l Bank v. Palmer*, 806 F.Supp. 253, 256 (M.D. Fla. 1992), and the legal determination of whether a claim is barred under principles of res judicata or collateral estoppel, *see, e.g., Jones v. Gann*, 703 F.2d 513, 515 (11th Cir. 1983).

Effect of LAI's Motion to Further Amend

After first acknowledging that the Summary Judgment Motion was fully briefed and ripe for adjudication, LAI argued that the Court should defer ruling on the Summary Judgment Motion, which was filed on December 10, 2001, and instead consider first LAI's Motion to Further Amend, originally filed on March 6, 2002, then withdrawn under the threat of a motion for sanctions

under Fed.R.Bankr.P. 9011, then renewed on April 3, 2002. The Court rejects LAI's argument.

First of all, LAI already requested and was granted leave to supplement its brief on the Summary Judgment Motion. Its Supplement was filed on April 2, 2002, almost a month after LAI had initially filed its Motion to Further Amend. Any facts alleged in LAI's proposed Second Amended Complaint which were relevant to the issues raised by the Summary Judgment Motion could have been identified by LAI in its Supplement. Indeed, LAI's Renewed Motion to Further Amend filed April 3, 2002 expressly refers to and incorporates LAI's Supplement:

> LAI's supplement to LAI's opposition to MHR's motion for summary judgment is incorporated by reference. ***The same evidence outlined in that supplement establishes why the amended complaint should be further amended to include that firm as a party.***

(ACP#115, ¶ 5) (emphasis added). LAI's argument at the May 22 hearing that the evidence supporting the allegations contained in the proposed Second Amended Complaint was not already part of the record, and thus that summary judgment cannot proceed, was flatly contradicted not only by LAI's acknowledgment at the beginning of the hearing that the Summary Judgment Motion was fully briefed, but also by its own prior pleading. In any event, those allegations, which are vigorously disputed, ultimately have no bearing on the issues raised by the Summary Judgment Motion, as explained in greater detail herein.

Secondly, courts have repeatedly held that a proposed amendment to a complaint should not interfere with a

pending motion for summary judgment. *See, e.g., Schneider v. Russell Corp.*, 823 F.2d 422, 429 (11th Cir. 1987) (court properly denied motion to amend complaint filed a week before hearing on summary judgment); *Local 472 of the United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada v. Georgia Power Co.*, 684 F.2d 721, 724-25 (11th Cir. 1982) (summary judgment properly granted and leave to amend denied where motion to amend was filed after filing of summary judgment motions); *Layfield v. Bill Heard Chevrolet Co.*, 607 F.2d 1097, 1098-99 (5th Cir. 1979), *cert. denied*, 446 U.S. 939, 100 S.Ct. 2161, 64 L.Ed.2d 793 (1980) (summary judgment properly granted and leave to amend denied where motion for leave to amend was filed after filing of summary judgment motions).

LAI's second attempt to amend its complaint, filed months after the Summary Judgment Motion, does not prevent this Court from considering the issues raised by the Summary Judgment Motion. Indeed, based on the rulings contained herein, the Motion to Further Amend will be denied as futile, since the Court's rulings preclude the possibility of any claim against any party for breach of fiduciary duty or misrepresentation arising out of any interference with LAI's ability to assert its supposed subordination rights. *See In re Holywell Corp.*, 177 B.R. 991, 998 (S.D. Fla. 1995), *aff'd*, 95 F.3d 57 (11th Cir. 1996).

Contractual Subordination

LAI has stipulated that there is no subordination agreement between itself and MHR (ACP#56). Rather, in asserting subordination rights, LAI relies on the NPA

between MHR and US Pool pursuant to which MHR loaned US Pool approximately $2.7 million. The following provisions of the NPA are relevant to LAI's contractual subordination claim:

> Article I *Definitions* . . . *"Permitted Vehicle Lease"*[5] means any automobile or truck lease entered into by the Company as lessee for a vehicle used by the Company in its Business, which leases shall constitute senior indebtedness to the Notes to the extent that if there is and continues to be an event of default by the Company under any such lease, the lessor shall be entitled to payment thereunder prior to any payment to the Purchasers under the Notes or PIK Notes; provided that: (i) the foregoing shall not apply with respect to any payments under or subject to the Purchasers' rights in respect of the Escrow Agreement; and (ii) that no lessor shall have rights of a secured creditor.[6]
>
> Article XIV *Miscellaneous* . . . *SECTION 14.1. Amendments.* Except as otherwise expressly provided herein, any term of this Agreement may be amended and the observance of any term of this Agreement may be waived (either generally or in a particular instance) only with the written consent of the Company and the holders of a majority in principle [sic] amount of the Notes and PIK Notes.

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[5] LAI has also identified four other instances in the NPA where the term "Permitted Vehicle Lease" appears, all of which refer to this same definition.

[6] LAI has omitted the final portion of this provision ("no lessor shall have rights of a secured creditor") every single time it has cited the provision in a pleading filed with this Court.

> Article XIV *Miscellaneous . . . SECTION 14.6. No Third Party Beneficiaries.* Except with respect to **Section 7.3** (Indemnification) and **Article XI** (Expenses; Indemnity) hereof, this Agreement does not create, and shall not be construed as creating any rights enforceable by any Person not a party to this Agreement.
>
> Article XIV *Miscellaneous . . . SECTION 14.7. Entire Agreement.* This Agreement, the Note Purchase Documents and other writings referred to herein or delivered pursuant hereto which form a part hereof contain the entire understanding of the parties hereto with respect to its subject matter. This Agreement supersedes all prior agreements and understandings between the parties with respect to its subject matter.

(ACP#38, Ex. "A").

Both MHR and LAI contend that the NPA is unambiguous and can be interpreted without reference to extrinsic evidence, but obviously reach dramatically different conclusions as to its meaning. LAI alleges in its Amended Complaint and in its Opposition that the references to the "Permitted Vehicle Lease" definition "unambiguously" show an intent that MHR's indebtedness be subordinated to LAI's claim.

MHR asserts that under basic principles of contract construction, the NPA does not by itself confer subordination rights on LAI, particularly with respect to MHR's exercise of its rights as a secured creditor in connection with the sale of US Pool's assets. Rather, MHR contends that the "Permitted Vehicle Lease" references in the NPA might give US Pool the authority to enter into vehicle leases and to require MHR to execute subordinations

consistent with the definition, but that the NPA was not "self-executing" so as to grant enforceable subordination rights to LAI without any further action by US Pool and MHR. Moreover, MHR argues that both the plain language of the NPA and applicable law preclude any assertion of subordination rights with respect to MHR's exercise of its right as a ***secured*** creditor to credit bid at a sale of its collateral.

The parties agree that New York law governs the construction and interpretation of the NPA (ACP#22, ¶ 29). In addition, 11 U.S.C. § 510(a) provides that a subordination agreement is enforceable in bankruptcy to the same extent that such agreement is enforceable under applicable non-bankruptcy law. Thus, the question is whether under non-bankruptcy law, the NPA creates any legally cognizable subordination rights enforceable by LAI in connection with MHR's acquisition of the assets of US Pool through a credit bid of its secured debt.

(1) <u>The NPA Does Not Create Subordination Rights Enforceable by LAI as a Non-Party</u>

In construing the NPA, the Court is guided by certain basic principles of contract construction. First, the intent of the parties must be determined from the document itself and no parol or extrinsic evidence is admissible absent ambiguity in the contract. *In re Gulf Oil/Cities Service Tender Offer Litigation,* 725 F.Supp. 712, 728 (S.D.N.Y. 1989), *citing Int'l Klafter Co. v. Continental Casualty Co.,* 869 F.2d 96, 100 (2d Cir. 1989). Second, where a contract contains an "integration clause" (i.e., a clause which provides that the contract represents the entire agreement of the parties and supersedes any prior

agreements or communications), extrinsic evidence may not be admitted to prove different or additional terms. *Id.* at 728, *citing Proteus Books, Ltd. v. Cherry Lane Music Co.*, 873 F.2d 502, 509-10 (2d Cir. 1989). Finally, a contract should be interpreted so as to give meaning to all of its provisions. *Piccoli A/S v. Calvin Klein Jeanswear Co.*, 19 F.Supp.2d 157, 164, n. 40 (S.D.N.Y. 1998), *citing Paine Webber Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2d Cir. 1996).

These principles are directly applicable to the determination of whether an agreement (such as the NPA) is intended to confer rights on a non-party (such as LAI). The intent to benefit a third party must be clear from the face of the contract. *Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 663 (2d Cir. 1996) ("New York law requires that the parties' intent to benefit a third party must be shown on the face of the agreement."); *see also Hylte Bruks Aktiebolag v. Babcock & Wilcox Co.*, 399 F.2d 289, 292 (2d Cir. 1968); *Akcess Pacific Group LLC v. Winstar Communications, Inc.*, 67 F.Supp.2d 394, 399 (S.D.N.Y. 1999); *Piccoli*, 19 F.Supp.2d at 163; *Barnum v. Millbrook Care Ltd. Partnership*, 850 F.Supp. 1227, 1234 (S.D.N.Y. 1994), *aff'd*, 43 F.3d 1458 (2d Cir. 1994); *Counihan v. Allstate Ins. Co.*, 142 F.R.D. 387 (E.D.N.Y. 1992).

New York courts have specifically held that "No Third Party Beneficiary" clauses such as the one contained in the NPA are enforceable according to their terms. *Gulf Oil*, 725 F.Supp. at 733. In *Gulf Oil*, the contract at issue contained a provision which states "This agreement . . . (i) constitutes the entire agreement . . . among the parties [and] (ii) . . . is not intended to confer upon any other person any rights or remedies." *Id.* The court found that this explicit language conclusively demonstrated the parties' specific intention ***not*** to confer third-party beneficiary

status on any non-party. *Id.* It further held that if two contracting parties expressly provide that some third party who might be benefitted by performance shall have no legally enforceable rights, the courts should effectuate their express intent by denying the third party any direct remedy. *Id.*

Several other decisions applying New York law reach similar conclusions. In *Hylte Bruks Aktiebolag,* 399 F.2d at 292, the Second Circuit held that an integration clause and a clause permitting modification upon the agreement of the contracting parties (such as are contained in the NPA) precluded the court from going beyond the contractual language to create rights enforceable by third parties. In *Piccoli,* 19 F.Supp.2d at 163-164, the court found that a clause prohibiting assignment without consent, and an "inurement clause" which provided that the agreement would inure to the benefit of permitted successors and assigns, precluded an interpretation which would create enforceable rights for parties other than permitted successors and assigns. The *Piccoli* court expressly noted that a third party's reliance on a contract provision does not of itself generate a right to enforce the contract. *Id.* at 164.

Based on the foregoing, it is clear that under New York law the "No Third Party Beneficiaries" clause – particularly when taken together with the integration clause and the clause permitting amendment of the NPA without notice to any non-parties – is enforceable according to its terms. Moreover, using these provisions as a guide for interpreting the "Permitted Vehicle Lease" definition, it becomes apparent that they are fundamentally inconsistent with an interpretation of the NPA as a self-executing subordination in favor of LAI. It would be a strange subordination provision which was not enforceable

by the supposedly senior creditor, and which was freely amendable by the obligor and obligee without notice to the supposedly senior creditor.

Indeed, the NPA does virtually none of the things which one would typically expect a subordination agreement to do. Aside from the facts that the NPA expressly disclaims any intention to create enforceable third party rights and can be amended without notice to any other party, the "Permitted Vehicle Lease" provision is contained in the "Definitions" section of the NPA rather than in a section describing the undertakings of the parties. The NPA contains no express covenant by US Pool not to make payments to MHR on the Notes if there is a default on a Permitted Vehicle Lease, nor any express covenant by MHR not to accept such payment or to remit such payment to any other creditor. It does not contain any prohibitions or restrictions on MHR from accelerating its debt. It does not provide any mechanism for supposedly senior creditors to give notice to MHR of any default on their obligations.

Upon reviewing the NPA in its entirety, the only way to construe the "Permitted Vehicle Lease" provision consistent with the entire agreement is to recognize it as merely a definition which gave the parties certain authority to create senior indebtedness, but did not do so by itself. The NPA by itself cannot be read as granting enforceable subordination rights to any other particular creditor, including LAI, especially in light of the "No Third Party Beneficiaries" provision and the other provisions cited above.

LAI has not attempted to present any interpretation of the NPA that would give LAI enforceable subordination

rights while also giving meaning to the "No Third Party Beneficiaries" provision and the other provisions referenced above. Rather, LAI argues in its Opposition that the Court should disregard the "No Third Party Beneficiary" provision or find it unenforceable as a matter of public policy. There is no principle of contract construction, at least under New York law, which would permit the Court to simply disregard provisions of the contract. To the contrary, the Court's obligation is to read the contract in its entirety in a way that gives meaning to each of its provisions. Moreover, LAI's suggestion that New York courts would hold the provision void as violating public policy is entirely unfounded. The *Gulf Oil* case unequivocally and expressly holds that such provisions are enforceable according to the terms.[7]

LAI also argues in its Opposition that subordination agreements are enforceable without reference to third party beneficiary law, citing *In re Credit Industrial Corp.*, 366 F.2d 402 (2d Cir. 1966). In *Credit Industrial,* however, the issue was not whether the contract at issue provided for third-party subordination rights. It was undisputed that the contract did so, and the question was whether the senior creditor's reliance was necessary where the agreement to subordinate in favor of a third party creditor was clear. The court noted that the contract was "explicit as to subordination," and moreover that the subordinated

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[7] LAI's citation to *Kalisch-Jarcho v. City of New York,* 58 N.Y.2d 377, 385, 461 N.Y.S.2d 746 (Ct. App. N.Y. 1983) does absolutely nothing to advance its argument. *Kalisch-Jarcho* dealt with the enforceability of an exculpatory clause in a contract which purported to excuse intentional wrongdoing. The public policy implications of such clauses have absolutely nothing to do with "No Third Party Beneficiary" clauses such as those contained in the NPA and those discussed in the *Gulf Oil* case.

creditors "also knew that there was to be no contractual relationship between them and the institutional [senior] creditors because 'all notice of the acceptance of this subordination provision by any institutional creditor' or 'of the reliance by any such institutional creditor upon the subordination herein contained' was specifically waived." *Id.* at 408.

Thus, *Credit Industrial* presents almost the direct opposite of the situation here, where rather than expressly waiving notice or reliance by any third party, MHR and US Pool specifically included a provision in the NPA to ***preclude*** reliance by any third party. LAI's citation to *Credit Industrial* does not answer the question of how the NPA can be interpreted as creating enforceable rights in favor of a non-party notwithstanding its unequivocal disavowal of any intention to do so.

Accordingly, the Court finds that the NPA, read in its entirety and giving meaning to each of its provisions, can not be construed as creating enforceable subordination rights in favor of LAI or any other creditor. Rather, it gives the parties the power to create vehicle leases which would have subordination rights, a power which indisputably was not exercised since LAI acknowledges that MHR never executed any subordination agreement with LAI.

(2) <u>Any Subordination Rights Under the NPA Would Not Affect HER's Rights as a Secured Creditor.</u>

Even if the Court were to find that the NPA creates enforceable subordination rights in favor of LAI, MHR argues that such subordination rights could not affect MHR's rights as a ***secured*** creditor including its right to

credit bid at a sale of its collateral. The Court agrees, based on both the plain language of the NPA and controlling Second Circuit authority.

First and foremost, the Court looks to the language contained in the "Permitted Vehicle Lease" definition which has been omitted by LAI each time it has cited the provision to the Court. The definition on which LAI relies itself states, "***no lessor shall have rights of a secured creditor.***" This language clearly and unequivocally confirms that any subordination rights which could be granted pursuant to this definition would ***not*** extend to MHR's rights as a secured creditor. In all of the papers it has filed with the Court, LAI has never even attempted to explain what this language otherwise could mean. Indeed, it has pretended that the language does not exist, omitting it from the citations in its pleadings, and repeatedly – inaccurately – claiming in its pleadings that "MHR had agreed in the NPA to subordinate its secured-creditor status to that of LAI."

Any attempt by LAI to assert subordination rights with respect to MHR's ***secured*** claim would also be completely inconsistent with New York law. NY UCC § 1-209 (the statute relied on by LAI to assert a contractual subordination claim) provides, "Such a subordination does not create a security interest against either the common debtor or a subordinated creditor." Moreover, the Second Circuit in *Allegaert v. Chemical Bank,* 657 F.2d 495 (2d Cir. 1980) has clearly held that a secured creditor's rights under its security agreement are enforceable notwithstanding a subordination agreement.

In *Allegaert,* Chemical Bank made a $5 million loan to a broker-dealer, Walston, evidenced by a Subordinated

Loan Agreement which was, in relevant part, "subordinated to Senior Claims." As part of a business combination with another company, DGF, Walston proposed to exchange cash for stock and debentures in DGF (which required Chemical Bank's consent). As a condition of its consent, Chemical Bank required a pledge of some of the DGF debentures. Walston and Chemical Bank then entered into a Pledge Agreement and an amendment to the Subordinated Loan Agreement which provided for the Subordinated Loan Agreement to be interpreted consistently with the Pledge Agreement.

Chemical Bank recovered approximately $2.6 million through payments on the debentures, and Walston subsequently filed bankruptcy. Walston's bankruptcy trustee then sued Chemical Bank, alleging among other things that the payments Chemical Bank received on the debentures were preferential because they were prohibited by the Subordinated Loan Agreement. In response, the Second Circuit held that Chemical Bank's rights under its security interest in the debentures were enforceable notwithstanding the subordination agreement:

> [U]nder the NYUCC, the security agreement between Walston and Chemical Bank was effective as against creditors notwithstanding the existence of a subordination agreement. Section 9-201 of the NYUCC provides: "Except as otherwise provided by this Act a security interest is effective according to its terms between the parties, against purchasers of the collateral and against creditors." This section has been called the "golden rule of Article Nine", and is fundamental to the treatment of security interests under the Code. In the word of one commentator, "What this (section) means is that the security

> agreement is the controlling document. It controls the rights and obligations between lender and borrower. It also binds third parties e.g., 'purchasers of the collateral and . . . creditors')." ***The validity of a security interest does not turn on the presence or absence of a subordination agreement, but a perfected security interest can certainly supersede and modify the effect of a subordination agreement. This superiority of a security interest over a subordination agreement is well-recognized by the experts in the field.***
>
> ***As the Code and commentators make clear, it is the operation of the security interest, not the subordination clause, which must be taken into account when determining the time and the nature of the transfer to Chemical Bank. Since the $2,233,333 payment to Chemical Bank was made pursuant to the PA's security interest, it is not affected by the subordination provisions of the SLA, and does not remain subordinated to senior claims.***

Id. at 508 (citations and footnotes omitted) (emphasis added).

Thus, in *Allegaert* the Second Circuit held that when a creditor, who had both executed a subordination agreement ***and*** received a security interest, received payment through the collateral to which its security interest attached, the payment did not violate the subordination agreement. This holding compels a finding that MHR's exercise of its right as a secured creditor to credit bid at a sale of US Pool's assets (in which MHR held an undisputed lien by virtue of its Security Agreement and UCC-1 Financing Statement) could not have been a violation of

any subordination agreement of which LAI could possibly claim to be a beneficiary.[8] Indeed, *Allegaert* would compel this finding even if the "Permitted Vehicle Lease" definition did not expressly state that "no lessor shall have rights of a secured creditor."

LAI's attempts to distinguish the *Allegaert* decision have instead simply misrepresented its facts. First, in its Opposition LAI claimed that "In that case Chemical bank had two irons in the fire – it held both a security interest in assets of the Debtor and was also a senior creditor due to a subordinated loan agreement." While the Chemical Bank loan was in fact senior to some other creditors, those other creditors had absolutely nothing to do with the case. Rather, it is abundantly clear that the decision addressed Chemical Bank's rights with respect to the "Senior Creditors" to which it had agreed to be subordinated.[9]

Then, in its Supplement, LAI claimed that "the underlying loan agreement had been amended so that Chemical Bank was no longer subject to the subordination agreement contained in the loan agreement." This, also, is a misstatement of the facts of the case. Nothing in the *Allegaert* opinion suggests that the Pledge Agreement by which Chemical Bank obtained collateral for its claim

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[8] It is undisputed that the Security Agreement between US Pool and MHR contains absolutely no reference to any "Permitted Vehicle Lease" or to the subordination of any portion of MHR's security interest to any other creditor (ACP#125, Ex. "D").

[9] The plaintiff trustee maintains that Paragraphs 3.1 and 6.4 of the SLA detailing the subordination of Chemical Bank's loan to Walston dictate that the payments received by Chemical Bank remain subordinated to senior claims, and thus constitute an impediment to Chemical Bank ever having collateral on that loan." *Id.* at 508.

eliminated the subordination provisions of the Subordinated Loan Agreement. To the contrary, it is clear that the Subordinated Loan Agreement was amended in order to be ***consistent*** with the Pledge Agreement.[10] Thus, the Chemical Bank loan remained subordinated but was also collateralized by the debentures.

This is exactly why the *Allegaert* court had to address the question of whether the payment Chemical Bank received from the debenture collateral violated the subordination provisions. If the subordination provisions had been eliminated, as claimed by LAI, the entire discussion of the superiority of a security interest to a subordination clause would have been entirely superfluous.

Since the ability of MHR to credit bid arises from its security interest in US Pool's assets, that right is unaffected by any subordination provisions in the NPA. Under both the plain language of the NPA and controlling law, LAI has no claim against MHR arising from MHR's acquisition of its lien collateral through a credit bid at a sale of US Pool's assets, regardless of whether LAI might otherwise have enforceable subordination rights under the NPA.[11]

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[10] The SLA was amended to conform with the PA. A new Paragraph 8 was added to the SLA stating that Paragraph 3 of the SLA (which consisted of a subordination and no-security provision) was to be construed consistently with the PA." *Id.* at 501.

[11] Based on the foregoing holdings, the Court finds it unnecessary to address MHR's assertion that any possible subordination rights of LAI were extinguished by the execution of the May 31, 2001 First Supplemental Agreement. Since LAI never had enforceable subordination rights under the NPA, the deletion of the "Permitted Vehicle Lease" provisions through the First Supplemental Agreement had no effect on LAI's rights.

(3) Any Subordination Claim is Barred by the Sale Order.

Finally, and alternatively, the Court notes that LAI's assertion of subordination rights against MHR is precluded under principles of res judicata as a result of the Court's entry of the Sale Order. The elements of res judicata or claim preclusion are:

(1) a prior decision rendered by a court of competent jurisdiction;

(2) a final judgment on the merits;

(3) both case involve the same parties or their privies; and

(4) both cases involve the same causes of action.

In re Piper Aircraft Corp., 244 F.3d 1289, 1296 (11th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S.Ct. 66 (2001). The Sale Order – which is a final order entered after a hearing upon notice to LAI and an opportunity to object – found and held that the sale process was fair, open and reasonable, that the agreement by which MHR acquired US Pool's assets was negotiated, proposed and entered into in good faith and without collusion, that MHR is a good faith purchaser, and that the sale of the property is free and clear of the claims of any parties. LAI never took an appeal of the Sale Order, and its efforts to modify or otherwise obtain relief from that Order through its Rule 60(b) Motion were rejected by this Court and by the District Court on appeal.

LAI's attempt, through this adversary proceeding, to assert a subordination claim against MHR notwithstanding the findings and protections in that Sale Order is

fundamentally inconsistent with basic principles of claim preclusion. *See American White Cross. Inc. v. Orentzal*, 269 B.R. 555 (D. Del. 2001) (creditor's failure to timely assert its rights under a subordination agreement prior to the confirmation of a Chapter 11 plan barred, under principles of claim preclusion, a subsequent action to enforce the creditor's subordination rights); *see also In re Justice Oaks II, Ltd.*, 898 F.2d 1544 (11th Cir. 1990); *CoreStates Bank. N.A. v. Huls American, Inc.*, 176 F.3d 187 (3d Cir. 1999); *In re Superior Used Cars, Inc.*, 258 B.R. 680 (Bankr. W.D. Mich. 2001).

The transaction which LAI claims has violated its purported subordination rights is MHR's acquisition of the property of US Pool through a credit bid – i.e., the very transaction authorized by the Sale Order. The relief sought by LAI against MHR – judgment for the amount of LAI's claims against US Pool – is completely inconsistent with the provisions of that final order, and in particular the provision that MHR is to receive the assets free and clear of any liens or claims. As a result, LAI is barred under principles of claim preclusion from-asserting either contractual or equitable subordination claims against MHR arising from MHR's acquisition of US Pool's assets, as approved by the Sale Order.

Equitable Subordination/
Breach of Fiduciary Duty/Misrepresentation

LAI's equitable subordination claim is based on two alleged instances of misconduct: (1) the execution of the May 31, 2001 First Supplemental Agreement which, among other things, amended the Note Purchase Agreement to delete any reference to "Permitted Vehicle

Leases;" and (2) Leslie Cloyd, Esq.'s response to Mr. Rothberg's August 7, 2001 request for a document "which effectively subordinates [MHR's] debt to the claim of Leasing Associates," and more particularly, LAI's claim that Ms. Cloyd's response was misleading and prevented LAI from effectively enforcing its alleged subordination rights. The breach of fiduciary duty and misrepresentation claims are also based on Ms. Cloyd's response to LAI's August 7 inquiry.

With respect to the execution of the First Supplemental Agreement, the Court has not in any way relied on that Agreement in determining that LAI has no subordination rights. Accordingly, regardless of any party's intent regarding the First Supplemental Agreement, its execution caused no injury to LAI.[12]

Indeed, the Court's conclusion that LAI did not have any contractual subordination rights against MHR which were implicated by MHR's credit bid of its secured debt renders moot ***all*** of LAI's remaining claims. If, as this Court has found, LAI never had enforceable subordination rights in the first place under the NPA, it could not have been injured by any alleged inequitable conduct, breach of fiduciary duty, or misrepresentation by US Pool, Berger Singerman, P.A. or MHR. Thus, it is entirely unnecessary

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[12] LAI's proposed Second Amended Complaint and Supplement argue not only that the execution of the First Supplemental Agreement was inequitable conduct, but also that it was not executed until July 6, 2001. Since the Court has found that the execution of the First Supplemental Agreement had absolutely no effect on LAI's rights (or more accurately, lack thereof), these facts, while disputed, are entirely immaterial to the issues raised by the Summary Judgment Motion.

for the Court to address the vigorously disputed facts which LAI alleges in support of these claims.

Even if this were not the case, however, these claims would all be barred under principles of res judicata and/or collateral estoppel, because they are based on the same factual predicate which resulted in the Court's entry of the Sale Order, the Order Denying Rule 60(b) Motion and the Order Denying Reconsideration. As discussed above, LAI's claims, based on MHR's acquisition of US Pool's property at the sale, are fundamentally inconsistent with, and precluded by, the express terms of the Sale Order. LAI's efforts to impose liability on MHR for its claims against US Pool in this adversary proceeding ultimately represent nothing more than an impermissible collateral attack on the Sale Order, after LAI's Rule 60(b) Motion and Motion for Reconsideration were denied, and then unsuccessfully appealed.

The application of claim preclusion is even more clear after considering the issues raised and decided on LAI's Rule 60(b) Motion and its Motion for Reconsideration. It is undisputed that the Order Denying Rule 60(b) Motion and Order Denying Reconsideration are final orders by a court of competent jurisdiction, and that they involved all of the parties to this action (LAI, MHR and US Pool). In evaluating the question of whether LAI's claims for equitable subordination, breach of fiduciary duty and misrepresentation involve the same causes of action as those raised by LAI in the Rule 60(b) Motion and the Motion for Reconsideration, the Eleventh Circuit instructs that claims are part of the same cause of action for res judicata purposes if they arise out of the same transaction or series of transactions. *Piper Aircraft*, 244 F.3d at 1296-97. The court must compare the substance of the actions and not their form. *Id.* at

1297. If the claims in the second action arise out of the "same nucleus of operative fact," or are based on the "same factual predicate" as the former action, then they are really the same "claim" or "cause of action" for purposes of res judicata. *Id.*

In its Summary Judgment Motion, MHR identified the following as undisputed facts:

> 21. The factual predicate of LAI's Rule 60(b) Motion and Motion for Reconsideration included the allegation by LAI that in response to LAI's August 7, 2001 inquiry, U.S. Pool's counsel made misrepresentations which supposedly prevented LAI from exercising or asserting its subordination rights. This same factual predicate forms the basis for LAI's claim for equitable subordination, breach of fiduciary duty, and misrepresentation.
>
> 22. The only claims of LAI in Counts II, III and IV of the Amended Complaint which do not arise out of the alleged misrepresentations made by U.S. Pool's counsel in response to LAI's August 7, 2001 inquiry are the allegations in Count II that on May 31, 2001 U.S. Pool and MHR entered into the First Supplemental Agreement which purported to cancel the subordination rights of LAI provided in the NPA, that no notice was given to LAI, and that the purported cancellation was inequitable conduct.

(ACP#37). LAI did not contest these undisputed facts, and indeed conceded them. Specifically, paragraph 1 of LAI's Opposition states, "LAI accepts MHR's statement of facts except paragraphs 6, 13 and 15." (ACP#50).

Even without LAI's concession, it is clear that LAI's claims for equitable subordination, breach of fiduciary

duty, and misrepresentation are all based on the assertion that Ms. Cloyd's response to Mr. Rothberg's inquiry was either materially false or deliberately misleading, and that it damaged LAI by preventing LAI from asserting its alleged subordination rights at the August 22 hearing on the Sale Motion. These claims represent nothing more than an attempt to relitigate the issues which were already raised and decided in connection with LAI's Rule 60(b) Motion and its Motion for Reconsideration in the main case.

The Court already conducted an evidentiary hearing in connection with LAI's Rule 60(b) Motion on October 12, 2001. LAI had the opportunity to and in fact did call witnesses at that hearing. There was extensive inquiry and testimony regarding Ms. Cloyd's response to Mr. Rothberg. (See Transcript of Oct. 12, 2001 hearing, MCP#87, PP. 93-104.) Indeed, the Court specifically permitted the extensive inquiry based on the provisions of Rule 60(b) regarding fraud:

THE COURT: Are you asserting a fraud here?

MR. GREENE: Your honor, if there is fraud we're entitled to know about it. . . .

THE COURT: I'll allow it, based on the provision within Rule 60(b) of fraud.

(MCP#87, P. 96 L. 18-25). Moreover, LAI specifically argued at that hearing that it was entitled to relief for, among other things, fraud:

MR. ROTHBERG: . . . I think that under Rule 60(b) I think the grounds that we have are surprise, inadvertence, excusable neglect, or for fraud. I think you

could say that we put on evidence today that satisfied all of those elements.

(*Id.*, P. 106 L. 14-18). LAI's counsel also specifically claimed that opposing counsel "provided inaccurate information, have not provided documents." (*Id.*, P. 122 L. 2-4).

After the Court denied LAI's Rule 60(b) Motion upon making the finding that LAI's inaction was due to its own deliberate decision rather than either excusable neglect or any other party's conduct, LAI then filed a Motion to Reconsider, yet again claiming that it was entitled to relief "because of misrepresentations made by the Debtor's counsel in connection with this matter." The Court conducted a further hearing on October 19, 2001 and expressly stated in denying the motion, "And I find there was no evidence of any conspiracy between the creditor and the debtor. There was no fraud." (MCP#91, P. 3 L. 20-22).

The Eleventh Circuit in *Piper* instructs that the court must examine not simply the "precise legal theory" presented in the previous litigation, but rather, "the factual issues that must be resolved in the second suit and compare them with the issues explored in the first case." *Piper*, 244 F.3d at 1298-99. Indeed, the doctrine of res judicata applies not only to issues which were actually raised in the prior action, but is conclusive as to all matters germane thereto and which either were or could have been raised. *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225 (11th Cir. 1999), *cert. denied*, 531 U.S. 815, 121 S.Ct. 51, 148 L.Ed.2d 20 (2000). LAI undoubtedly raised its allegations of misconduct by Ms. Cloyd in responding to Mr. Rothberg's August 7 inquiry in connection with the Rule 60(b) Motion, and those issues were undoubtedly

resolved against LAI. This Court already conclusively determined that LAI's failure to oppose the sale was the result of its own deliberate decision, rather than the misconduct of any other party. LAI does not get to relitigate those claims by calling them claims for equitable subordination, breach of fiduciary or misrepresentation.

Likewise, LAI's claims are also barred under the doctrine of collateral estoppel or issue preclusion. The doctrine of collateral estoppel forecloses litigation of an issue of fact or law where the identical issue has been raised, litigated and decided in a prior suit. *Agripost*, 195 F.3d at 1234; *Grosz v. City of Miami Beach, Florida*, 82 F.3d 1005, 1006 (11th Cir. 1996). The issues of the reasons for LAI's failure to oppose entry of the Sale Order, and its allegations of misconduct by opposing parties, were actually raised and litigated in connection with the Rule 60(b) Motion and the Motion for Reconsideration. They were decided against LAI in the Order Denying Rule 60(b) Motion and Order Denying Reconsideration. Those decisions preclude LAI from now continuing to assert claims of misconduct to support its supposed causes of action for equitable subordination, breach of fiduciary duty or misrepresentation.

CONCLUSION

The Court does not treat lightly any allegations of inequitable conduct, breach of fiduciary duty or misrepresentation. However, LAI has already had the opportunity to present its case on the facts supporting those claims, and the Court ruled against LAI in the Order Denying Rule 60(b) Motion and the Order Denying Reconsideration. Those Orders were appealed by LAI to the United States District Court, and affirmed in full. LAI appealed to

the Eleventh Circuit Court of Appeals, but then voluntarily dismissed its appeal. Relitigation of those issues now would constitute an improper collateral attack on the Sale Order, the Order Denying Rule 60(b) Motion and the Order Denying Reconsideration, and would be fundamentally inconsistent with basic principles of res judicata and collateral estoppel.

Perhaps even more important is the fact that LAI never had any enforceable subordination rights which would have permitted it to assert any claims against MHR arising from MHR's credit bid of its secured debt at the sale of US Pool's assets. The Note Purchase Agreement between US Pool and MHR on which LAI relies for its supposed subordination rights unambiguously states that it is not intended to create rights enforceable by non-parties, and also unambiguously states that no lessor shall right rights of a secured creditor.

ORDER

In light of the foregoing, and with the Court being otherwise fully advised in the premises, it is hereby **ORDERED AND ADJUDGED** that:

1. MHR's Motion for Summary Judgment on Amended Complaint is **GRANTED** as to all counts of LAI's Amended Complaint against MHR and US Pool.

2. LAI's Cross-Motion for Summary Judgment on Count I of the Amended Complaint is **DENIED**.

3. LAI's Renewed Motion to Further Amend is **DENIED** with prejudice.

4. Any other pending motions are **DENIED AS MOOT**, except for *MHR's Motion for Sanctions Pursuant to Fed.R.Bankr.P. 9011 Against LAI and its Counsel*, and

Berger Singerman, P.A.'s Motion for Sanctions Against LAI's Counsel.

5. A Final Judgment will be entered consistent with this Memorandum Decision and Order.

DONE AND ORDERED in Fort Lauderdale, Florida this 17 day of June, 2002.

/s/ Paul Hyman
PAUL G. HYMAN, JR.
United States Bankruptcy
Judge

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U.S. Trustee
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Constitutional provisions, treaties, statutes, ordinances, and regulations

U.S. Constitution, Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.

11 U.S.C. § 327. Employment of professional persons

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, **that do not hold or represent an interest adverse to the estate, and that are disinterested persons**, to represent or assist the trustee in carrying out the trustee's duties under this title [11 UCS §§ 101 et seq.].

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title [11 UCS § 721, 1202, or 1108], and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title [11 UCS §§ 701 et seq., 1201 et seq., or 1101 et seq.], a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

11 U.S.C. § 704. Duties of trustee

The trustee shall –

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title [11 UCS § 521(2)(B)];

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) **unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;**

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

11 U.S.C. § 1106. Duties of trustee and examiner

(a) A trustee shall –

(1) **perform the duties of a trustee specified in sections** 704(2), 704(5), 704(7), 704(8), and 704(9) of this title [11 UCS §§ 704(2), 704(5), **704(7)**, 704(8), and 704(9)].

(2) if the debtor has not done so, file the list, schedule, and statement required under section 521(1) of this title [11 UCS § 521(1)];

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(4) as soon as practicable –

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and

(B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates;

(5) as soon as practicable, file a plan under section 1121 of this title [11 UCS § 1121], file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title [11 UCS §§ 701 et seq., 1201 et seq., or 1301 et seq.] or dismissal of the case;

(6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of

the condition of the debtor's books and records and the availability of such information; and

(7) after confirmation of a plan, file such reports as are necessary or as the court orders.

(b) An examiner appointed under section 1104(d) of this title [11 UCS § 1104(d)] shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.

11 U.S.C. § 1107. Rights, powers and duties of debtor in possession

(a) Subject to any limitations on a trustee serving in a case under this chapter [11 UCS §§ 1101 et seq.], and to such limitations or conditions as the court prescribes, **a debtor in possession** shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and **shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4)** of this title [11 UCS §§ 1106(a)(2), (3), and (4)], **of a trustee** serving in a case under this chapter [11 UCS §§ 1101 et seq.].

(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

28 U.S.C § 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Bankruptcy Rule 2014. Employment of Professional Persons

(a) Application for an order of employment. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. **The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys** and accountants, the United States

trustee, or any person employed in the office of the United States trustee.

(b) Services rendered by member or associate of firm of attorneys or accountants. If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.

NY UCC 1-109

Subordinated obligations. An obligation may be issued as subordinated to payment of another obligation of the person obligated, or a creditor may subordinate his right to payment of an obligation by agreement with either the person obligated or another creditor of the person obligated. **Such a subordination does not create a security interest** as against either the common debtor or a subordinated creditor. This section shall be construed as declaring the law as it existed prior to the enactment of this section and not as modifying it.

NY UCC 9-339

This article does not preclude subordination by agreement **by a person entitled to priority**.

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In Re:	Case No.
U.S. POOL CORP.	01-33622-BKC-PGH
Debtor. /	Chapter 11

ORDER DENYING LEASING ASSOCIATES, INC.'S EMERGENCY MOTION TO MODIFY ORDER GRANTING DEBTOR'S MOTION FOR AN ORDER AUTHORIZING SALE OF SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS

THIS CAUSE came before the Court on October 12, 2001, on Leasing Associates, Inc.'s Emergency Motion to Modify Order Granting Debtor's Motion For an Order Authorizing Sale of Substantially All of The Debtor's Assets (the "Motion"). The Court having heard testimony of witnesses called by the parties, received exhibits into evidence, reviewed the Motion, heard argument of counsel, and being otherwise fully advised in the premises,

IT IS HEREBY ORDERED AND ADJUDGED THAT:[1]

1. The Motion is DENIED. For the reasons stated on the record, the Court finds that the movant did not carry its burden of showing grounds under Fed. R. Civ.P. 60(b)(1), as incorporated by Fed.R.Bankr.P. 9024, for modification of this Court's August 27, 2001 "Order Granting Debtor's Motion For an Order Authorizing Sale of

[1] Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. *See*, Bankruptcy Rule 7052.

Substantially All of The Debtor's Assets Free And Clear of All Liens, Claims, Interests And Encumbrances Pursuant to 11 U.S.C. § 363(b)(f) and (k)."

ORDERED in the Southern District of Florida on October 22, 2001.

/s/ Paul Hyman
PAUL G. HYMAN, JR.
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In Re:
U.S. POOL CORP.
Debtor. /

Case No.
01-33622-BKC-PGH
Chapter 11

ORDER DENYING EMERGENCY MOTION OF LEASING ASSOCIATES, INC. TO RECONSIDER DECISION DENYING RULE 60(B) MOTION OR IN THE ALTERNATIVE FOR STAY PENDING APPEAL

THIS CAUSE came before the Court on October 19, 2001, on the Emergency Motion of Leasing Associates, Inc. to Reconsider Decision Denying Rule 60(b) Motion, Or In the Alternative, For Stay Pending Appeal (the "Motion"). The Court having considered the Motion and heard argument of counsel, and being otherwise duly advised in the premises, it is hereby

IT IS HEREBY ORDERED AND ADJUDGED THAT:

The Motion is DENIED in all respects, for the reasons set forth on the record, without prejudice to the right of Leasing Associates, Inc. to obtain a stay, after notice and a hearing, by posting an appropriate bond in an amount sufficient to protect the interests of the Debtor, MHR and U.S. Pool Acquisition Corp.

DONE AND ORDERED in the Southern District of Florida on October 23, 2001.

/s/ Paul Hyman
PAUL G. HYMAN, JR.
United States Bankruptcy Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 01-8913-CIV-RYSKAMP

IN RE:

U.S. POOL CORP.,

Debtor.

_____/

LEASING ASSOCIATES, INC.
a/k/a LAI TRUST,

Appellant,

v.

U.S. POOL CORP., MHR
INSTITUTIONAL PARTNERS, LP,
MHS CAPITAL PARTNERS LP,
MHRM PARTNERS, LP

Appellee.

_____/

ORDER GRANTING EMERGENCY MOTION FOR STAY PENDING APPEAL

(Filed Oct. 26, 2001)

THIS CAUSE came before the Court upon Appellant Leasing Associates, Inc., a/k/a LAI Trust's ("LAI") Emergency Motion for Stay Pending Appeal [DE 1]. Appellees U.S. Pool Corp. ("U.S. Pool") and MHR Institutional Partners, LP, MHS Capital Partners, LP, and MHRM Partners, LP (collectively, "MHR") have responded. This motion is ripe for review.

On July 9, 2001, U.S. Pool filed a petition under Chapter 11 of the Bankruptcy Code. On July [illegible],

2001, U.S. Pool filed a Motion to Sell Free and Clear of Liens, Claims, Interests and Encumbrances. Substantially All of the Debtor's Assets ("Sale Motion"). After a hearing, the Bankruptcy Court entered on August 27, 2001, an Order Granting Debtor's Motion for an Order Authorizing Sale of Substantially All of the Debtor's Assets Free and Clear of Liens, Claims Interests and Encumbrances ("Sale Order"). The Bankruptcy Court subsequently denied LAI's Motion for Relief from the Sale Order. In this instant motion, LAI moves the Court to enter an order staying the effect of the Bankruptcy Court's Sale Order.

THE COURT having considered the motion and the pertinent portions of the record, being otherwise fully advised in the premises, and in the interest of justice and judicial economy, it is hereby

ORDERED AND ADJUDGED the following:

1. Appellant's Emergency Motion for Stay Pending Appeal **[DE 1]** is **GRANTED**. The above-styled matter shall be **STAYED** pending appeal of In re U.S. Pool Corp. and pending further order of this Court. The parties shall keep the Court informed on this matter.

2. The appeal shall be on an **expedited** basis. Briefs shall be filed in **twenty (20) days** from the date of this Order. Responses shall be filed **ten (10) days** thereafter. The appeal shall be heard in forty-five days. Oral arguments are set for **December 17, 2001.**

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 26 day of October, 2001.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided
Michael Greene, Esq
Edward Rothberg, Esq
Charles Throckmorton, Esq (fax: 305-372-3508)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Judge Paul G. Hyman, Jr.

In Re :

Case No. 01-33622-BKC-PGH

U.S. POOL CORP.,
Debtor

LEASING ASSOCIATES, INC.
Plaintiff,

vs. Case No. 01-3196-BKC-PGH-A

U.S. POOL CORP.,
Defendant.

MOTION BY PLAINTIFF LEASING ASSOCIATES, INC. FOR LEAVE OF COURT TO AMEND COMPLAINT VALIDITY, PRIORITY EXTENT LIEN. MOTION BY DEBTOR U.S. POOL TO EXTEND EXCLUSIVITY

November 28, 2001

The above entitled cause came on for hearing before the HONORABLE PAUL G. HYMAN, JR., one of the Judges sitting in the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, at 701 Clematis Street, West Palm Beach, Palm Beach County, Florida, on November 28, 2001, commencing on or about 9:30 a.m., and the following proceedings were had:

APPEARANCES:

BERGER SINGERMAN
By: LESLIE GERN CLOYD, ESQUIRE
On behalf of the Debtor

KOZYAK TROPIN & THROCKMORTON
By: DAVID ROSENDORF, ESQUIRE
On behalf of MHR entities
Appearing by telephone)

MICHAEL GREENE, P.A.
By: MICHAEL GREENE, ESQUIRE
On behalf of Leasing Associates

[2] THE COURT: Leasing Associates versus U.S. Leasing.

MR. GREENE: Good morning, Your Honor. I believe you mean U.S. Pool.

THE COURT: U.S. Pool. What did I say? U.S. Leasing. Yes, Leasing Associates versus U.S. Pool.

MR. GREENE: Michael Greene for Leasing Associates, Your Honor.

THE COURT: Thanks for making that correction for me.

MS. CLOYD: Leslie Cloyd representing the debtor.

Judge, is there a request for MHR's counsel to appear by phone?

THE COURT: No.

MS. CLOYD: We had expected them to be here. I don't know if they're caught up in traffic or what.

THE COURT: Not that I have. I have two things, one in the main case, a motion to extend exclusivity.

MS. CLOYD: Yes, Judge. Judge, I don't think that there is an objection to that.

THE COURT: Anyone here opposing it?

MS. CLOYD: There are several attorneys present who represent unsecured creditors. I have not heard an [3] objection from them.

THE COURT: And then the motion – who do you represent, sir?

MR. GREENE: Leasing Associates, Your Honor, motion –

THE COURT: You're here on a motion to continue the pre-trial on that.

MS. CLOYD: I have that order on the main case matter.

THE COURT: Why don't you wait and let's deal with them both at the same time. Any opposition?

MS. CLOYD: To which matter, Judge?

THE COURT: Motion to continue.

MR. GREENE: Your Honor, first we should hear the motion for leave to amend.

MS. CLOYD: I agree.

THE COURT: I don't even have that on the calendar.

MR. GREENE: That is the one on the calendar, Your Honor.

THE COURT: I've got motion to continue, and – you're right. Never mind.

MR. GREENE: The motion to continue is not on the calendar for some reason, but the motion for leave to amend is.

[4] THE COURT: Whoever put the files up here didn't put everything together. There is a request for telephone hearing by Mr. Rosendorf.

(Thereupon, the Court contacted Mr. Rosendorf by telephone.)

THE COURT: Good morning, it's Judge Hyman. How are you?

MR. ROSENDORF: I'm fine. Thank you, Your Honor.

THE COURT: I'm calling about Leasing Associates versus U.S. Pool.

MR. ROSENDORF: Yes. Thank you for accommodating me by phone.

THE COURT: You're welcome. First, the motion for leave to amend.

MR. ROSENDORF: Yes.

THE COURT: Go ahead, sir.

MR. GREENE: Your Honor, Michael Greene for Leasing Associates. We filed a motion for leave to amend

to add three counts to our original one count adversary complaint.

We had originally just filed a count for legal – based on legal subordination. Subsequently we learned the facts that gave us reason to want to add counts for equitable subordination, as well as violation of [5] fiduciary duty and either negligent or intentional misrepresentation. We filed a proposed amended complaint, and if you grant the motion we would obviously need some time to do the pleadings, and that's why we've asked for a continuance. Thank you.

THE COURT: Okay. Any objections?

MR. ROSENDORF: Your Honor, David Rosendorf of Kozyak, Tropin and Throckmorton representing for shorthand, the MHR entities, defendants in this adversary proceeding.

Your Honor, we do oppose the proposed amendment, recognizing that you know, as a general rule, leave to amend is freely given, there are also limitations on that. In particular, one of the key ones, which is applicable here, is that leave to amend should not be granted where the proposed amendment is futile. We assert that the proposed amendment here is futile because it is based on the exact same allegations which were the subject of Leasing Associates Rule 60 motion, specifically the alleged misrepresentations by U.S. Pool's counsel, which this Court already rejected, and as a result, the proposed amendments are barred under principles of res judicata.

Now Judge, first of all, back tracking a little bit, you were certainly aware of what was heard [6] on October 12th, what was raised in their Rule 60 motion. Those

things were the subject of an evidentiary hearing, and I think with possibly only one very limited exception, the proposed amendments, which are the subject of this amended complaint, are the exact same thing. It is based exclusively on the supposed representations which this Court has already rejected, and in rejecting Leasing Associates' request for relief under Rule 60(b)(3) this court expressly found that there is no alleged – no conspiracy between MHR and U.S. Pool, and that there was no evidence of fraud. And those findings do have preclusive effect on these proposed amendments.

Your Honor, the principle that amendment shouldn't be allowed where it's futile, is recognized by the Supreme Court in the case of Bowman versus Davis, 371 US 178, and it's followed in the 11th Circuit in cases such as Deamba (phonetic) versus Cascade, the cite for which is 256 F 3d 1194. In particular these principles have been applied where the proposed amendment would be barred by res judicata. There's a case in the Middle District of Florida called Harris versus District Florida Trustees, 9F Sub 2d 1319, from the year 1998, which expressly finds that. Now I don't think that there's any question that these proposed [7] allegations are in fact, the subject of res judicata.

The 11th Circuit recent case in Piper Aircraft, which was just reported this year at 244 F 3d 1289, makes clear that for res judicata purposes in determining whether cost are the same, the question is whether they arise out of the same nucleus of fact. And I think that these clearly do.

Now, we have previewed these arguments to Leasing Associates counsel and advised them that we intended to oppose this amendment on these grounds. I think that the

only real question that has been raised is whether that order denying their Rule 60(b) motion has preclusive effect where it is on appeal. And the answer to that, unequivocally to that in the 11th Circuit is yes, the 11th Circuit has expressly held that a final judgment retains all of its res judicata effect while an appeal is pending. And that was held in the case of Javry (phonetic) versus Wallace, 837 F 2nd 1461. So we believe that all proposed amendments which relate to the supposed misrepresentation theory, which this court already rejected, are barred under principles of res judicata.

The only allegation in the proposed and amended complaint which does not relate to Leasing Associates' informal request for information back in [8] August is the suggestion that the equitable subordination claim that the first supplemental agreement entered into between MHR and U.S. Pool in May, 2001, represented inequitable conduct which justified equitable subordination. And Judge, we believe that this count also is not a proper subject of amendment.

It may take me a minute to explain why, but I think that it's basically subsumed within the contractural subordination claim. Quite simply, the contractual subordination claim that Leasing Associates have asserted is that the February, 2000 note agreement between U.S. Pool and MHR gives Leasing Associates some subordination rights. The only way that we reach the question of whether this supplemental agreement would possibly be relevant is first, if the Court accepts that principle, that the note agreement does create subordination rights, but secondly, that this supplemental agreement takes them away. And if that's the case, on the contractural subordination claim, if the Court finds that the supplemental

agreement is legally enforceable, then Leasing Associates will not have contractural subordination rights.

What they're trying to do by asserting an equitable subordination claim is to say that even if that is a completely legally enforceable agreement [9] between MHR and U.S. Pool, then nonetheless it represents inequitable conduct. And that principle, I would suggest, is simply untenable because a party's exercise of their legal rights cannot constitute inequitable conduct.

Judge, there is a case out of the 7th Circuit which expressly addresses that issue in the context of the context of one lender to another. It's called Com and Nate Shoes (phonetic) versus First Bank of Whiting, 908 F 2d 1351. There's simply no duty on the part of MHR alleged in this complaint, nor one that could be alleged, to not enforce whatever legal rights it may have. So that if that is an enforceable agreement, there would be no grounds for equitable subordination, so we believe that leave to amend that should not be granted in any form.

THE COURT: Ms. Cloyd.

MS. CLOYD: Judge, on behalf of the debtor, I'm not going to repeat what Mr. Rosendorf has said. Certainly he has stated his objections very succinctly, and the case law that backs it up.

The debtor's position is that your ruling is based on the same set of facts as the attempted amendment to the complaint, and we think that the motion to amend complaint should be denied for the reasons [10] stated so eloquently by Mr. Rosendorf.

At that hearing, Judge, you took evidence. You heard from Rick Andron, the principal of the debtor as to the

meaning of the contractural provisions, you heard testimony from counsel at that hearing, and you made your finding based on the record and based on the testimony and other evidence before you. We think it is res judicata, Judge. It is on an expedited briefing schedule, but as of now, Judge, your order stands. It is a valid order in this case. It is res judicata. The same exact parties are involved in the complaint as were involved in the motion for Rule 60 relief. And Judge, we would ask that the motion to amend complaint be denied.

THE COURT: Yes, sir.

MR. GREENE: Your Honor, I'd like to respond. In the hearing on October 12th the issue before the Court was whether an order should be modified based on allegations of surprise and excusable neglect. We hadn't alleged misrepresentation because we didn't realize there had been misrepresentation until at the hearing we tried to find out from Ms. Cloyd whether she was aware of the language in the exhibits that she had offered on August 22nd, on the afternoon of August 22nd, after telling Mr. Rothberg by an e-mail on the morning [11] of August 22nd that there were no such documents.

Actually her response was literally correct, or could be literally correct, when she said she was not aware of any agreement between MHR and Leasing Associates. And there is no such agreement. But Mr. Rothberg didn't ask for that agreement. He asked for any documents which effectively subordinate MHR's claim to LAI. And that subordination language is found in an agreement between U.S. Pool and MHR, not LAI and MHR. Had LAI entered into an agreement with MHR, it would have had the document, obviously, and would not have needed to seek it.

Ms. Cloyd's response was literally true, but misleading. As the debtor counsel, the debtor had a duty under the law to provide information to any – to interested parties who asked for it. Mr. Rothberg was eminently reasonably justified in taking Counsel's word that there was no such document. Even though her answer was literally true, it was misleading.

The Court was not asked to rule on the allegations in the amended complaint. The Court was asked to determine whether Leasing Associates' conduct was excusable neglect.

THE COURT: I agree. This is not the same issue.

[12] MR. GREENE: Not res judicata.

MR. ROSENDORF: Judge, may I reply to that?

MR. GREENE: I'm not finished, Your Honor.

THE COURT: Well, I really don't need – Mr. Rosendorf, I've taken a look at the complaint. They are not one and the same, and it is not res judicata as to the issue raised in the complaint, in the amended complaint.

MR. GREENE: With respect to the previews I got, I got a phone call at 5:30 last night. I went to the law school library and researched law of the case, which is what we discussed, and we're now talking about res judicata. I didn't hear about the cases that were cited today to the Court.

THE COURT: This is without prejudice to them asserting any affirmative defense that's appropriate, but

I'm going to allow you to file you're amended complaint, and we'll go on from there.

MR. ROSENDORF: Judge, if I may, I do need to reply to one thing that I think is a clear misstatement, which is whether the issue of misrepresentation was raised. I encourage you, Judge, to look at the motion for reconsideration of the Court's order denying Rule 60(b) motion which was filed by Leasing Associates, which expressly and unequivocally raised and requested [13] relief under Rule 60(b)(3) for fraud, misrepresentation or other misconduct.

MR. GREENE: That was after October 12th, Your Honor.

THE COURT: I agree. Beginning with paragraph 33, he talks about the president stated that the document is too voluminous, no copy was ever received, et cetera. There is substantial allegations that were not raised at the hearing. They are entitled to allege these allegations, and *I* will deal with the factual basis or any sort of motion to dismiss, but I'm going to grant their motion to amend the complaint.

MR. GREENE: Thank you, Your Honor.

We need to consider the motion for continuance. What that issue was, basically the District Court has expedited a briefing schedule and oral arguments are set for December 17th. It's not necessarily, but a good chance that the District Court's ruling would moot some of the issues in the amended complaint. And it seems a waste to have a trial January 6th or whatever, when the District Court may be coming out with a – er a pre-trial conference on January 6th when the District Court ruling may not be

entered at that time. That's why I've asked for two months instead of one month.

[14] THE COURT: Well, I will tell you, sir, I'm not going to wait for the District Court to rule before we proceed on this. Is there any opposition to a continuance?

MS. CLOYD: Your Honor, my client has consented to a one month continuance.

THE COURT: Okay. Mr. Rosendorf.

MR. ROSENDORF: Certainly if the complaint is going to be amended, we're going to need more time.

THE COURT: I'll continue this to March 6th at 9:30. That's the pre-trial. But understand, sir, one continuance.

MR. GREENE: Yes, Your Honor, I heard.

MS. CLOYD: May I have one moment to confer with counsel on another matter? Judge, I just want to confirm for the record, there are a bunch of depos set today, tomorrow and Friday on short notice by Mr. Greene as a precaution in case the continuance wasn't granted, and I believe all counsel have agreed those will be continued to a more mutually agreeable date.

MR. GREENE: We agree, Your Honor. We would rather take them on a more leisurely basis.

THE COURT: That's fine. Now, Mr. Rosendorf, you had also requested to appear by phone on the Morristown Equity versus Gosman case, but I got a message saying you didn't want to appear on that.

MR. ROSENDORF: I don't need to appear on that matter. Thank you. Mr. Bakst is going to be there for the hearing on that.

THE COURT: He's here.

MS. CLOYD: Your Honor, we still have the motion for exclusivity.

THE COURT: I thought that I called that. Any objection to the motion to extend exclusivity? Hearing none, I'll grant it. Goodbye, Mr. Rosendorf.

MR. ROSENDORF: Thank you, Your Honor.

MR. GREENE: Your Honor, would you like me to prepare an order on the motion?

THE COURT: Yes.

MR. GREENE: And on the motion for continuance, I provided the Court with a form order.

THE COURT: We always throw them away because otherwise I run amuck and sign them thinking that I've had a hearing on them.

MR. GREENE: One of the things I was apprised that the local rules say that the motion for continuance is an ex parte matter, but your clerk says that you have hearings on it.

THE COURT: I think what the rules say is they may be considered on ex parte basis.

[16] MR. GREENE: I just followed the rules and supplied the form.

THE COURT: I'm not faulting you for what you do. I always set them down so people know, one continuance.

MS. CLOYD: Judge, the order on continuance, should it just be a simple order reciting for the reasons stated in court is continued and incorporating your pretrial order?

THE COURT: Yes.

MS. CLOYD: Thank you, Judge.

MR. GREENE: Thank you, Your Honor.

(The proceedings were concluded.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

Case No. 01-8966-CIV-RYSKAMP

IN RE:

U.S. POOL CORP.,

Debtor.

LEASING ASSOCIATES, INC.
a/k/a LAI TRUST,

Appellant,

v.

U.S. POOL CORP., MHR
INSTITUTIONAL PARTNERS, LP,
MHS CAPITAL PARTNERS, LP,
and MHRM PARTNERS, LP,

Appellee.

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ORDER AFFIRMING BANKRUPTCY COURT'S ORDERS

(Filed Dec. 17, 2001)

THIS CAUSE comes before the Court upon the appeal of Appellant Leasing Associates, Inc., a/k/a LAI Trust ("LAI") from two final orders of the bankruptcy court. Appellants appeal (1) the October 22, 2001 order denying Appellant's Emergency Motion to Modify Order Authorizing Sale of Substantially All of the Debtor's Assets; and (2) the October 23, 2001 order denying Appellant's motion to reconsider the denial of the first order. The appellees are the debtor, U.S. Pool Corp. ("U.S. Pool"), and the secured

creditors, MHR Institutional Partners, LP, MHS Capital Partners, LP, and MHRM Partners, LP (collectively, "MHR"). The appeal has been fully briefed and oral arguments were heard in open court on December 17, 2001.

The standard of appellate review for a motion for relief from a judgment under Rule 60(b) is whether the lower court abused its discretion. *See Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1316 (11th Cir. 2000); Wright, Miller & Kane, *Federal Practice and Procedure Civil 2d* § 2857. The case at bar presents similar facts to that of *In re Celotex Corp.*, 232 B.R. 493 (M.D. Fla. 1999), *aff'd*, 196 F.3d 1262 (11th Cir. 1999), where the court concluded that relief could not be granted for the deliberate and conscious action (or inaction) of a debtor's creditor. Having heard the oral arguments and having considered the pertinent portions of the record and being otherwise fully advised in the premises, the court finds that the bankruptcy court did not abuse its discretion. Therefore, it is hereby

ORDERED AND ADJUDGED that the bankruptcy court's orders are **AFFIRMED**. The Clerk of the Court shall **CLOSE** the case and **DENY** any pending motions **AS MOOT.**

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 17 day of December, 2001.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:
Michael Greene, Esq.
Edward Rothberg, Esq.
David Rosendorf, Esq.
Charles Throckmorton, IV, Esq.
Leslie Cloyd, Esq., c/o Berger Singerman, 350 East Las Olas Blvd, Suite 100, Ft. Lauderdale, FL 33301

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE:

U.S. POOL CORP.

DEBTOR.

_____/

CASE NO.
01-33622-BKC-PGH
(CHAPTER 11)

LEASING ASSOCIATES, INC. a/k/a LAI TRUST,

PLAINTIFF,

v.

U.S. POOL CORP., MHR INSTITUTIONAL PARTNERS, LP, MHR CAPITAL PARTNERS LP, and MHRM PARTNERS, LP,

DEFENDANTS.

_____/

ADVERSARY NO.
01-3196-BKC-PGH

PLAINTIFF LAI'S SUPPLEMENT TO MEMORANDUM IN OPPOSITION TO MHR'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, LEASING ASSOCIATES, INC. a/k/a LAI TRUST ("LAI"), submits this supplement to its opposition to MHR's Motion for Summary Judgment on Amended Complaint. In support thereof LAI relies on the supplemental affidavit of Michael E. Greene, and the deposition transcripts of Scott Weinstein, Charles Throckmorton, Richard Andron, Hal Goldstein, Mark Rachesky, Edward Rotrhberg [sic], Ronald Janak, and Leslie Cloyd, each of which have been filed with the Court and were did not exist [sic] when the initial opposition of LAI was filed.

Facts:

1. In its initial opposition LAI stated at paragraph 7: [O]n May 31, 2001, and six weeks prior to the petition being filed in this case, the Debtor and U.S. Pool entered into a First Supplemental Agreement (MHR's Exhibit C) in which the subordination provisions of the [Note purchase Agreement of February 4, 2000] were purportedly extinguished." That statement needs correction.

2. LAI has since learned that there are at least two executed documents entitled "First Supplemental Agreement". Only the latter version was presented as evidence to the Court by the Debtor in Possession and MHR. Each version contains a statement that the agreement was entered into on May 31, 2001, and executed as of that date. (Andron Dep. Ex. 27 & 28).

3. There was a First Supplemental Agreement signed on or about May 31, 2001. Leslie Cloyd sent an e-mail on June 22, 2001 to various persons[1] which said in part: "Dan the client also wants you to look into the subordination clause on the truck lease and how it affects, if at all, the MHR lien. Please work with Chuck on this." Cloyd Dep Ex 42 (last page).

4. When Ms. Cloyd was asked in her deposition "what subordination was that referring to?" she answered: "There was some sort of language in the documents that no one seemed to know what it meant. It referred to . . . permitted vehicle leases, if there were any being subordinated to

[1] The e-mail was sent to Mr. Throckmorton, Mr. Goldstein (MHR's attorney and administrator), with copies to Richard Andron (U.S. Pool's president), Paul Singerman, Brian Rich, and Daniel Lampert (attorneys with Berger Singerman)

payment under certain circumstances to the senior debt. . . . " Cloyd Dep. 37:24-38:5.

5. On June 27, 2001, Daniel Lampert, an attorney with Berger Singerman sent a copy of page 7 of the Note Purchase Agreement to Mr. Throckmorton by telefax. Page 7 contains the generic subordination provision ("permitted vehicle lease") in favor of "any" vehicle lessors who lease to U.S. Pool. LAI leased vehicles to U.S. Pool. (Janak Affidavit).

6. Copies of e-mails attached as exhibits to the deposition transcripts of U.S. Pool/Andron, MHR/Goldstein, and Berger Singerman/Cloyd establish that the "final draft" of the last First Supplemental Agreement ("FSA") was attached to an e-mail dated July 6, 2001, and that the draft was approved by Hal Goldstein of MHR on July 6, 2001. Cloyd Dep. Ex. 42; Compare Andron Dep Exs. 26, 27, & 28; and Goldstein Dep. Ex. 40.

7. The initial FSA which was apparently executed on or about June 1, 2001, says nothing about the "permitted vehicle lease" definition which the latter FSA purports to amend out of existence. Compare Cloyd Deposition Exhibits 46 and 47, including attached e-mails. A "final first supplemental agreement; with final loan numbers" was attached to an e-mail from Dan Lampert, dated June 1, 2001, to Richard Andron, Charles Throckmorton and Hal Goldstein. Cloyd Dep. Ex. 46. Charles Throckmorton approved the loan documents on May 30, 2001. Goldstein Dep Ex. 40.

8. An explanation of Berger Singerman that the e-mail transmitting the second final draft of the First Supplemental Agreement was sent to Mr. Throckmorton so he would know what the loan documents looked like is

found starting at page 32 of Berger Singerman's response in opposition to LAI's motion to further amend the complaint. That explanation supports an assertion that the second version was signed immediately after the first.

9. On July 6, 2001, Leslie Cloyd sent an e-mail to Hal Goldstein which said, in part: "I am on a conference call with Phyllis and Brian now and Paul is up to date. You will be receiving the $80,000 loan docs and the minutes. Let us know asap if there is anything else you need to review. . . . " Mr. Throckmorton was not an addressee of that e-mail. Goldstein Dep. Ex 40.

10. It seems obvious from the above e-mails, the telefax, and from the context of other documents provided in discovery, that the First Supplemental Agreement presented to the Court as evidence in July 2001 was executed immediately prior to the filing of Chapter 11 on Monday July 9, 2001, and one week prior to being submitted as evidence of a loan actually made several weeks earlier.

11. From the foregoing it is even more apparent that Ms. Cloyd gave evasive answers in her testimony at the hearing on LAI's Rule 60(b) motion on October 12, 2001, even to questions asked by the Court. Excerpts of her testimony are attached hereto for the Court's convenience.

12. Berger Singerman was retained by U.S. Pool in February 2001, and billed U.S. Pool at MHR's address in New York City in February 2001. That invoice includes a charge for Ms. Cloyd's services. (Cloyd Dep. Ex. 50). She was asked at that hearing: "Were you representing U.S. Pool at that time, May 31, 2001?" Her answer was: "I don't recall the exact date of our representation." (103:11-14).

This is but one example of a literally correct statement intended to evade providing requested information.

13. Mr. Andron testified that he signed the second version of the First Supplemental Agreement because MHR insisted and he needed the money. In her deposition Ms. Cloyd testified that documents she had seen showed that the proceeds from the supplemental loan were furnished in late May 2001. (P. 49:12-15). However, the e-mails described above indicate that the second version was being drafted and reviewed between June 22 and July 6, 2001. U.S. Pool already had the money.

14. The supplemental affidavit of Michael E. Greene establishes that he also saw documents produced by U.S. Pool which reflect that the proceeds of the FSA loan were disbursed in late May or early June.

15. Ron Janak received a copy of page 7 of the NPA on or about February 16, 2000 (Janak Dep. 61:18-62:14). A day or two later Janak reviewed the Note Purchase Agreement in Florida because U.S. Pool would not send him a copy of the entire document. (Janak Dep. 66:8-67:6). About a year and a half later, in July 2001, Janak did not recall which document that he reviewed contained the subordination language. (Janak Dep 108:18-109:4).

16. After the bankruptcy was filed Janak tried to get a copy of the document he had reviewed through the efforts of LAI's local sales representative, Scott Weinstein. Janak then told Ed Rothberg that there was a subordination agreement he had seen in favor of LAI, but did not recall the name of the document he had reviewed or where within the document the provision was. He did not remember that he had a copy of page 7 in his files so he did not show it to Mr. Rothberg. (Janak Dep. 89:10-91-11).

17. According to the Supplemental Affidavit of Michael E. Greene, during a short break in the Andron deposition Mr. Greene looked at a small portion of the documents produced for inspection by Berger Singerman, and found an unsigned Subordination Agreement (an Exhibit to the Note Purchase Agreement of February 4, 2000) which Mr. Rothberg had requested from Ms. Cloyd to no avail in early September 2001. This was also a document Mr. Andron had looked for to no avail causing him to believe the subordination language of page 7 of the NPA was hypothetical. (Andron Dep. Ex 32). The subordination agreement was between MHR and U.S. Pool shareholders who were also secured creditors who subordinated their interests to MHR.

18. Mr. Throckmorton produced both a signed and an unsigned version of the Subordination Agreement on January 7, 2001. (Dep. Exs. 8 & 9.) Mr. Goldstein had a copy of the entire NPA with all the exhibits. (Goldstein Dep. 70:19-24)

19. At a hearing on February 6, 2002, the Court advised the attorneys for the various defendants to promptly prepare a privilege log to justify withholding documents requested by LAI based on their claims of attorney-client privilege and attorney work product. The privilege log of U.S. Pool was served the day after the hearing.

20. The privilege log of Berger Singerman was served by telefax just before 4 p.m. on Friday, March 1, 2002. A draft had been provided after 5:30 pm. February 28, 2002, during the deposition of Leslie Cloyd of Berger Singerman, but a copy could not be retained.

21. On March 6, 2002, the Court required generic listings in the privilege log to be made specific, and on March 8, 2002. Berger Singerman filed a second privilege log. On March 14, 2002, Berger Singerman filed a third privilege log, listing 49 additional documents.

22. The privilege log of Kozyak, Tropin and Throckmorton and the privilege log of MHR were served by telefax just after 5 p.m. on Friday, March 1, 2002.

23. Each of the privileged logs is deficient in that none comply with Bankruptcy Rule 7026(b)(5), which requires a description "of the nature of the documents, communications, or other things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." Therefore, there is likely to be certain evidence favorable to LAI which has improperly been withheld on improper claims of privilege.

24. On the date of filing bankruptcy, the Debtor's secured lenders, MHR INSTITUTIONAL PARTNERS, LP, MHR CAPITAL PARTNERS, LP and MHRM PARTNERS, LP (collectively referred to as "MHR"), were in complete control of the Debtor's board of directors. Indeed, MHR authorized the filing of the Chapter 11 petition.

25. This information was unknown at the time of the bankruptcy filing because the affidavit in support of the employment application filed by Debtor's counsel specifically stated that MHR had not exercised its right to take over the board under the loan documents. However, there have been only two directors since May 23, 2001: Mr. Rachesky and Richard Andron, who was hand picked by

Mr. Rachesky, according to Mr. Rachesky's letter of January 10, 2001, to be the new CEO. (Andron Dep. Ex. 23).

26. Moreover, at a hearing in this Court held on October 12, 2001, the Debtor's president testified that as of the end of January 2001 there were three directors in addition to himself – Mr. Rachesky and two employees of U.S. Pool. (TR. p. 63 ll.9-16).

27. During discovery taken in connection with Leasing Associates, Inc. a/k/a LAI Trust, vs. U.S. Pool Corp., MHR Institutional Partners, LP, MHR Capital Partners, LP and MHRM Partners, LP, Adversary No. 01-3196-BKC-PGH-A (the "Adversary Proceeding"), LAI learned that both of the board members who were also employees had resigned by May 23, 2001, well before the bankruptcy filing, and before the first May 31, 2001 First Supplemental Agreement. (Andron Dep. Exs. 15 & 22). Lee Morris, the majority owner of the common stock had resigned on January 19, 2001. (Andron Dep. Ex. 18).

28. The two board members remaining after the resignation of the two U.S. Pool employee/directors were Mark H. Rachesky, MHR's designated board member, and Richard Andron who was handpicked to replace majority shareholder Lee Morris prior to Morris' resignation in January. (Andron Dep. Ex. 23) ("MHR has identified an individual who has tentatively agreed to become CEO of the Company").

29. Within a few days of Andron's appointment as president and director, U.S. Pool defaulted on the note payments to MHR, and Morris protested that there was no need for U.S. Pool to default. (Andron Dep. Ex. 20). As a result of the default, Rachesky had the ability to appoint a majority of the directors. There was no need to do that

because Rachesky and Andron, hand-picked by Rachesky to replace Morris, were and have been the only board members since May 23, 2001.

30. The Debtor's failure to disclose that it was being operated by its secured lender is was [sic] misleading to LAI's counsel. The statement in early filings in the bankruptcy case that MHR had not yet exercised its right to appoint additional board members to gain control of the board, without stating that MHR had de facto control of the board since April 10, 2001, when Alan Kane resigned, is a literally correct statement which was intended to mislead.

31. Hal Goldstein of MHR coordinated preparation for the bankruptcy filing. (Goldstein Dep. Ex 40).

32. Documents submitted to the Court by Ms. Cloyd were intended to mislead as to the control of the Debtor by MHR, its senior secured creditor. The language used in the application of Berger Singerman, and other first day documents implied that MHR had no representation on the board. On June 22, 2001, MHR's attorney recommended advising the Court that MHR "is represented on the Debtor's Board of Directors." That recommendation was not followed. (Cloyd Dep. Ex. 42 & 45).

33. Berger Singerman now claims attorney client privilege with respect to communications with Hal Goldstein of MHR as Mark Rachesky's agent, assumedly because Mr. Rachesky is a board member. The Debtor in Possession also claimed common interest basis for the privilege, even though it owed a fiduciary duty to LAI.

34. On August 24, 2001, in response to Mr. Rothberg's e-mail of August 23, 2001, asking for the loan documents, Ms. Cloyd sent Mr. Rothberg an e-mail stating

that she would send him the loan documents. Less than an hour after her e-mail to him, Mr. Rothberg thanked Ms. Cloyd by e-mail and said that he looked forward to seeing the documents. Cloyd Dep. Ex. 49.

35. On September 5, 2001, Mr. Rothberg received the sale order, and telephoned Ms. Cloyd to discuss it. He asked Ms. Cloyd to Federal Express the loan documents which he had still not received, and by e-mail gave Ms. Cloyd his firm's Federal Express account number that same day. Cloyd Dep. Ex. 49 & 50.

ARGUMENT

Count I Subordination Contract

MHR has informally expressed its disagreement with LAI's analysis of *Allegaert v. Chemical Bank*, 657 F.2d 495, 508 (2d Cir. 1980) in LAI's initial opposition to the motion for summary judgment. MHR relies upon the following statement from that case: "[T]he operation of the security interest, not the subordination clause, . . . must be taken into account when determining the time and the nature of the transfer to Chemical Bank". LAI's initial response was and still is: "It is not clear how *Allegaert* has any impact on this case, where MHR had agreed in the NPA to subordinate its secured-creditor status to that of LAI." As previously mentioned, the *Allegaert* Court does point out that parties to a contract usually do not negotiate absurd results. *Id.* at 506 n.9.

In *Allegaert* there was no creditor claiming under a subordination agreement as there is in the instant case. Instead, the Trustee was trying to establish a preference in an alternative argument based on a subordination agreement. However, the underlying loan agreement had

been amended so that Chemical Bank was no longer subject to the subordination agreement contained in the loan agreement. There was no challenge to the amendment in that case. There is in this case. The subordination agreement in the instant case was contained in the same loan document that created the security interest of MHR. MHR explicitly agreed that it would be subordinate to LAI upon default. Whether MHR and U.S. Pool could amend the loan agreement and deprive LAI of its subordination rights after it had relied u0on [sic] the agreement is covered in the initial opposition of LAI.

Counts III and IV: Fiduciary Duty/Misrepresentation

The Debtor's attorney had a duty to make a reasonable inquiry of the management of U.S. POOL before making the misleading response that was made. Pursuant to 11 U.S.C. §§ 1107 and 1106, and 706(7), Defendant U.S. POOL, as Debtor in Possession, had a duty to provide requested information to LAI which was an interested party. In *In re Whitney Place Partners*, 147 B.R. 619, 620-21 (Bankr. N.D. Ga. 1992) the Court stated that the attorney for a debtor in possession has a fiduciary duty to creditors and shareholders of the debtor. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985) allows the Trustee of a debtor corporation to waive attorney client privilege of the debtor, and discusses the fiduciary relationship of the Trustee to creditors.

LAI does not complain that the Debtor in Possession had a duty to protect it, while a case could be made under *Weintraub* for such an argument. LAI's claim for violation of fiduciary duty and misrepresentation are based on the failure to provide a non-misleading response to a request

for information which LAI had every right under the Bankruptcy Code to get without resort to formal discovery. What the evidence points to in the instant case is that MHR controlled the debtor in possession, and the attorneys for the debtor in possession could not do enough to please MHR, but when LAI made a simple request for information, the attorneys commenced a stonewalling operation which has succeeded up until now.

In *In re Cochise College Park, Inc.*, 703 F.2d 1339 (9th Cir. 1982) the Ninth Circuit stated:

> A bankruptcy or reorganization trustee is a fiduciary of each creditor of the estate, including anyone who is a party to an executory contract with the bankrupt. *See Wolf v. Weinstein*, 372 U.S. 633, 650, 10 L. Ed. 2d 33, 83 S. Ct. 969 (1963); *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, 461 (6th Cir. 1982); *Sherr v. Winkler*, 552 F.2d 1367, 1374 (10th Cir. 1977); *Moulded Products, Inc. v. Barry*, 474 F.2d 220, 224 (8th Cir.), cert. denied, 412 U.S. 940, 37 L. Ed. 2d 400, 93 S. Ct. 2779 (1973). As such, he has a duty to treat all creditors fairly and to exercise that measure of care and diligence that an ordinarily prudent person under similar circumstances would exercise. *Weaver*, 680 F.2d at 461; *Sherr*, 552 F.2d at 1374; *In re Johnson*, 518 F.2d 246, 251 (10th Cir.), cert. denied, 423 U.S. 893, 46 L. Ed. 2d 125, 96 S. Ct. 191 (1975). Although a trustee is not liable in any manner for mistakes in judgment where discretion is allowed, *Mosser v. Darrow*, 341 U.S. 267, 273-74, 95 L. Ed. 927, 71 S. Ct. 680 (1951); *Weaver*, 680 F.2d at 461; *Sherr*, 552 F.2d at 1375, he is subject to personal liability for not only intentional but also negligent violations of duties imposed upon him by law, see *Mosser*, 341

> U.S. at 272, 274; *Johnson*, 518 F.2d 246, 251; cf. *Leonard v. Vrooman*, 383 F.2d 556, 561 (9th Cir. 1967) (trustee is personally liable for acts which either are not taken in good faith or are unreasonable). n26

At a minimum, the attorney for the debtor in possession failed to make a diligent inquiry before finally responding to Mr. Rothberg's request for information. In the alternative, the attorney was either was [sic] intentionally misinformed by the Debtor, or intentionally provided the misleading information. U.S. POOL breached its duty under the law in failing to provide the requested information. It went even further than that and instead provided information to LAI's Houston counsel calculated to mislead him into believing the document he was seeking did not exist.

A statement does not have to be materially false in and of itself to support an action for misrepresentation of violation of fiduciary duty. *In Board of Public Instruction of Dade County v. Everett W. Martin & Son, Inc.*, 97 So.2d 21, 26 (Fla. 1957) the Florida Supreme Court stated that fraud cannot ordinarily be perpetrated by silence but, quoting from an earlier case, stated:

> "The rule that fraud cannot be predicated of a failure to disclose facts where the information is as accessible to one party as to the other, and the truth may be ascertained by the exercise of reasonable diligence, does not justify a resort to active deceit or fraud, and hence, does not apply where a party in addition to non-disclosure uses any artifice to throw the other party off his guard and to lull him into a false security. Therefore, each party to the contract must take care not to say or do anything tending to impose upon the

> other. The concealment becomes a fraud where it is effected by misleading and deceptive talk, acts of conduct, or is accompanied by misrepresentations, or where in addition to a party's silence there is any statement, word or act on his part which tends affirmatively to a suppression of the truth, or to the covering up or disguising of the truth, or to a withdrawal or distraction of a party's addition to the real facts; then the line is over stepped and the concealment becomes a fraud.'"

In *State of Florida, Department of Transportation Appellant, v. Southern Bell Telephone and Telegraph Company, Inc.*, 635 So.2d 74, 78 (Fla 1st D.C.A. 1994) the Court stated the following:

> The elements of a misrepresentation claim include: (1) a false statement concerning a material fact, (2) knowledge by the person making the statement that it was false, (3) intent by the person making the statement to induce another's reliance, and (4) [**11] reliance by such other person on the misrepresentation, causing injury to him or her. *Lance v. Wade*, 457 So. 2d 1008, 1011 (Fla. 1984). Moreover, under certain circumstances, concealment or nondisclosure of a material fact may also form a basis for a claim in misrepresentation. 27 Fla. Jur. 2d Fraud & Deceit § 36 (1981). And see *Franklin v. Brown*, 159 So. 2d 893, 898 (Fla. 1st DCA 1964).

Thus it is clear that the protestations of the defendants that what Ms. Cloyd said in her e-mail of August 22, 2001 to Mr. Rothberg was literally correct is not a defense to what is alleged against defendants. The failure to provide the information which Ms. Cloyd knew, or should have known, Mr. Rothberg was requesting was both a

violation of fiduciary duty and a misrepresentation. LAI admits the literal correctness of the statement. Defendants cannot prevail on summary judgment on any count.

WHEREFORE, LAI prays that: the Court enter a judgment with respect to Count I declaring that MHR's claim is subordinated to the claim of LAI; the Court enter a judgment against each of the MHR entities, jointly and severally, in the ultimate amount of LAI's claims with respect to all of the leases; and, the Court grant such other and further relief as is just and proper.

I hereby certify that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this court set forth in Local Rule 2090-1(A).

Michael E. Greene, P.A.

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ATTORNEYS FOR LEASING
ASSOCIATES, INC. a/k/a LAI TRUST

Excerpt from testimony of Leslie Cloyd on October 12, 2001, at hearing on LAI's Rule 60(b) motion. "Exhibit 2" referred to at page 102 is to the same First Supplemental Agreement which Leslie Cloyd had presented as evidence at hearings in July 2001 and August 2001.

* * *

[0098] agreement?

A Correct.

Q Isn't it true that Mr. Rothberg's letter doesn't ask you for a subordination agreement, but a document which effectively subordinates the debt to the claim of Leasing Associates, isn't that what it says?

I'll show it to you.

A The letter speaks for itself.

Q Okay. Now, is it your testimony that when you told Mr. Rothberg that there was no such document, I'm not aware of such a document, that you did that based on your legal opinion with respect to the language in Plaintiff's Exhibit 1, or because you didn't know about the language in Plaintiff's Exhibit 1?

A Are you asking me for my opinion?

Q No. I'm asking you, when you wrote this e-mail saying that, I'm not aware of such a document, was that based on you not being aware of the provisions, the two different provisions in Plaintiff's Exhibit 1 which says that people who lease vehicles will be senior debt? Was it because you were not aware of those provisions, or was it your legal opinion that those were not sufficient to create a subordination situation?

A The letter asks me – the letter – I'll read it again. "It is our understanding that MHR executed an [0099] agreement which effectively subordinates its debt to the claim of Leasing Associates. I would appreciate your forwarding me a copy of this document. If you do not have it, please let me know who is representing MHR so I can obtain a copy.

Q And my question is, when you said that, was it because you were not aware of the two provisions in Plaintiff's Exhibit 1 which ostensibly give Leasing Associates a subordination right, at least that's our position, you were not aware of those provisions, or was it your legal opinion that those provisions were not effective?

A At the time I sent the e-mail I was not aware of any document which would effectively subordinate MHR's debt to that of Leasing Associates. Leasing Associates did not put forth its theory that these loan documents created a subordination until the motion to amend order.

Q So do I understand that it was based on your legal opinion that the language was not sufficient, is that why you told Mr. Rothberg there was no such document?

A My e-mail was based on my opinion as an attorney that I was not aware of any document that effectively subordinates the debt of MHR to the claim of [0100] Leasing Associates. I considered Mr. Rothberg's letter to be a request for a specific document that linked MHR and Leasing Associates, at least that's how I understood it, and I responded to it after I got his prompt of August 21. I don't have that letter in front of me.

Q So are you saying that you are aware of the language on page 7 and pages 10 and 11 of Plaintiff's

Exhibit 1, but you didn't think it was effective to create a subordination right in Leasing Associates?

MR. THROCKMORTON: Objection. Asked and answered.

THE COURT: Sustained. She's given you the answer – her answer to it.

MR. GREENE: Your answer was that you were not aware of any document which created a subordination agreement; is that correct?

MR. THROCKMORTON: Objection. Asked and answered.

MR. GREENE: I'm trying to understand her answer, Your Honor.

THE COURT: I'll allow it. You can answer.

THE WITNESS: Could you –

BY MR. GREENE:

Q Was it your answer that you were not aware of a document which created subordination rights in favor [0101] of Leasing Associates?

A And I'm still not aware of such a document.

Q Is that based on your legal opinion or based on – well, now you're saying you're still not aware. My question is, at the time you sent this e-mail, had you seen the language and formed a legal opinion that it was not effective, or were you ignorant of the language, yes or no, if you can?

MR. THROCKMORTON: Objection. Asked –

THE COURT: I'll overrule it. She hasn't answered that question.

THE WITNESS: Okay. So I'm supposed to answer the question?

THE COURT: Yes.

THE WITNESS: Let me answer it in this way. I have been aware of the loan documents between MHR and U.S. Pool since close to the conception – close to the inception of the case. We had a hearing before the Court on July 13th, I believe it was, on the interim use of cash collateral, and these documents were handed out to the parties at that hearing, including Mr. Morris' counsel, the US Trustee. They were –

THE COURT: Ms. Cloyd, his question is very easy. Were you aware of the language in that agreement when you wrote the letter back to Mr. Rothberg, of that [0102] particular language in paragraph 6, 7, whatever, in the the definition.

THE WITNESS: Was I aware of the security agreement?

THE COURT: No. Of the particular language that they are asserting creates their right to subordination, of that particular language. That's all they're asking.

THE WITNESS: At the time that I wrote the e-mail?

THE COURT: Yes.

THE WITNESS: I was not focusing on the U.S. Pool MHR loan documents. I looked through the documents

that I had, and did not see a subordination agreement. I offered to send Mr. Rothberg all the loan documents so he could look at them for himself and make his own opinion, and that's what I did.

BY MR. GREENE:

Q Were you aware of Plaintiff's Exhibit 2 at the time you sent the e-mail to Mr. Rothberg?

A Same answer as Exhibit 1. I was aware of all of these documents, these documents have been in court proceedings in my possession since at least July 13th.

Q So you were aware that on May 31, 2001, a few weeks before the bankruptcy was filed, that the language [0103] that Leasing Associates is running upon was deleted from the note purchase agreement by the Exhibit 2, which is the supplemental agreement, you were aware of that?

A Could you repeat that question?

Q Does Exhibit 2, at least in part, delete the subordination language that Leasing Associates, at least is relying upon as creating subordination rights?

A I don't know what language Leasing Associates is relying on. Paragraph 2 does contain a reference to an amendment by deleting a definition of the term, permitted vehicle lease. The document –

Q Does the term subordination wind up in that paragraph?

A What this document says is that, toward the end, it's amended by deleting from its entirety the definition of the term permitted vehicle lease and all provisions of the

note purchase agreement or other note purchase agreements relating thereto, so that in no event shall any obligation under the notes or PIK notes be subordinated in lien right of payment or otherwise to any vehicle lease of the debtor.

Q You were familiar with that provision when you sent Mr. Rothberg the e-mail?

A I had this document in my possession. What this document does is delete any subordination.

[0104] Q My question is, were you familiar with it, not whether you had the document in your possession, but were you familiar with the language?

A I hadn't read it specifically before I sent him the e-mail, no.

Q Have you ever read that before?

A I don't recall specifically reading this language. I knew that there was a loan in May, 2001 in the amount of $80,000, and this is one of the documents that went with those loan documents.

Q Were you representing U.S. Pool at that time, May 31, 2001?

A I don't recall the exact date of our representation.

MR. GREENE: No further questions.

* * *

AFFIDAVIT OF MICHAEL E. GREENE IN SUPPORT OF PLAINTIFF LAI'S MEMORANDUM IN OPPOSITION TO MHR'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF LAI'S CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT I AND REQUESTING CONTINUANCE PURSUANT TO RULE 7056(f)

State of Florida

County of Florida

Michael E. Greene, being first duly sworn, deposes and says:

* * *

9. The employment application states that MHR had the option to take control of the Debtor which it had not exercised. It appears to me that MHR had control of the Debtor by reason of selecting the sole director of the Debtor. Discovery is intended to determine this issue.

* * *

[Filed Jan. 3, 2002]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE:

U.S. POOL CORP.
DEBTOR.
_____/

CASE NO.
01-33622-BKC-PGH
(CHAPTER 11)

LEASING ASSOCIATES, INC. a/k/a LAI TRUST,

PLAINTIFF,

v.

U.S. POOL CORP., MHR INSTITUTIONAL PARTNERS, LP, MHR CAPITAL PARTNERS LP, and MHRM PARTNERS, LP,

DEFENDANTS. _____/

ADVERSARY NO.
01-3196-BKC-PGH

[EXCERPTS]

PLAINTIFF LAI'S MEMORANDUM IN OPPOSITION TO MHR'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF LAI'S CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT I

Plaintiff, LEASING ASSOCIATES, INC. a/k/a LAI TRUST ("LAI"), submits this opposition to MHR's Motion for Summary Judgment on Amended Complaint, and its cross

* * *

[4] ARGUMENT

Count 1: Contractual Subordination

The NPA

Contrary to the argument contained in MHR's motion, the Note Purchase Agreement ("NPA") contains five separate provisions interspersed throughout the contract which unambiguously show an intent that MRH's indebtedness be subordinated to the indebtedness incurred by U.S. Pool with respect to "Permitted Vehicle Leases", like those the Debtor entered into with LAI prepetition. The five provisions are described below.

The main provision is found at page 7 of the NPA. There the term "*Permitted Vehicle Lease*" is defined as "any automobile or truck lease entered into by the company as lessee for a vehicle used by the Company in its Business, which lease shall constitute senior indebtedness to the Notes. . . . " That definition goes on to state that in the event of a default "the lessor shall be entitled to payment thereunder prior to payment to Purchasers under the Notes or PIK Notes." That provision also states that "no lessor shall have rights of a secured creditor."

In the definition of "Lien", at page 5, the NPA states that "a Permitted Vehicle Lease shall not constitute a Lien."

The third provision is found in Section 2.2 of the NPA, at pages 10-11, which states:

> [S]o long as the Notes or the PIK Notes . . . are outstanding, the Company will, at the request of the Purchasers . . . take such further action and enter into such further documents and agreements as may be requested by the Purchasers . . . in order to

> provide, grant, protect and continue a first priority interest in favor of the Purchasers . . . to secure the obligations under the Notes and PIK Notes and under this Agreement and the Note Purchase Documents *subject to payment rights of the Permitted Vehicle Leases as contemplated by the definition thereof.*

The fourth provision, in Section 5.2, at page 23, entitled "*Existing Indebtedness*", provides: "All Indebtedness of the Company (other than Permitted Vehicle Leases) shall have been subordinated to the Indebtedness represented by the Notes and to be represented by the PIK Notes and other Indebtedness owed to Purchasers . . . in the form of the Subordination Agreement."

Finally, Section 7.9, at pages 28-29, restricts the Company from incurring any indebtedness not subordinated to the Notes and PIK Notes, other than that arising from leasing office equipment and "Permitted Vehicle Leases". It is uncertain whether MHR's intention to subordinate is shown in the attachments because many attachments have not been provided. Nevertheless, the five different provisions of the NPA cannot be ignored as MHR's argument attempts to do.

In addition to the multiple references to LAI's subordination rights in the NPA, the Debtor and MHR entered into an agreement on May 31, 2001, the First Supplemental Loan Agreement, to extinguish the very subordination rights which MHR now contends never existed.

<u>New York subordination law:</u>

In the instant motion, MHR argues that since LAI is not specifically mentioned in the NPA, its subordination

rights, if any, must be derived from its status as a third party beneficiary. Then, MHR provides an extended discussion of the law on third party beneficiaries and concludes that LAI is not a third party beneficiary primarily because NPA Section 14.6 disclaims the existence of any third party beneficiaries. However, under New York law, made applicable by NPA Section 14.2,[1] MHR's entire argument is irrelevant because contractual subordination agreements are enforceable by their terms without any reference to whether or not the senior creditor is or is not a third party beneficiary.

* * *

[12] Contract Interpretation:

MHR contends that the subordination rights provided to vehicle lessors in the NPA are not enforceable because of Section 14.6 which states that the agreement "shall not be construed as creating any rights enforceable by any Person not a party to this Agreement." Interpretation of the NPA under New York law requires giving consideration to all of the terms of the agreement. In *In re United Merchants and Manufacturers*, Inc., 623 F.2d 804, 897 (2d Cir. 1980) the court stated: "if possible, effect must be given to every sentence of an instrument" In addition, the court stated: "A contract should be read, wherever possible, to achieve a result that is fair and sensible, not one that is harsh and inexplicable." *Id.* MHR's argument gives no effect to the numerous provisions relating to LAI's

[1] Section 14.2 of the NPA provides that it shall be "construed in accordance with and governed by" New York law without giving effect to New York choice of law provisions. LAI accepts that New York law is applicable to issues arising under the NPA, as does MHR in its motion for summary judgment at page 11.

subordination rights, which would lead to a harsh and inexplicable result under the facts and circumstances of this case.

In *International Klafter Company, Inc., v. Continental Casualty Company, Inc.*, 869 F.2d 96, 99 (2d Cir. 1989), the Second Circuit stated:

> Under New York law, which governs here, the court is required to discern the intent of the parties to the extent their intent is evidenced by their written agreement. *Slatt v. Slatt*, 64 N.Y.2d 966, 967, 477 N.E.2d 1099, 1100, 488 N.Y.S.2d 645, 646 (1985). Where the parties' intent is "clearly and unambiguously set forth, effect must be given to the intent as indicated by the language used." *Id.* (citations omitted).

In that case the Second Circuit was able to reconcile two apparently conflicting provisions, and explained its decision in an earlier case where it could not:

> In *Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017 (2d Cir. 1985), we applied New York law to an employment contract which provided for termination for any of several enumerated reasons "or any other reason". We found that this language was ambiguous, since to give the "catch-all" phrase its clear meaning would be to render the enumeration of reasons purposeless.

Id. at 99-100.

On its face, the NPA provided the terms of a loan to the Debtor from MHR. The NPA also offered protection and encouragement to vehicle lessors which leased vehicles to the Debtor. A fair and sensible interpretation must give effect to the subordination provisions, disregarding

the disclaimer which renders several provisions meaningless.

The goal of effectuating the intention of the parties was addressed in *In PaineWebber Incorporated, v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir 1996), in which the Second Circuit found the contract to be ambiguous, and said:

> . . . Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement." [citations omitted]. Furthermore, where "the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law," and a claim turning on that interpretation may thus be determined by summary judgment or by dismissal. [citations omitted]. As *Mastrobuono* [*Mastrobuono v. Shearson Lehman Hutton, Inc.*, 131 L. Ed. 2d 76, 115 S. Ct. 1212, 1217 (1995)] makes clear, the common-law rule of contract interpretation that "a court should construe ambiguous language against the interest of the party that drafted it" applies in interpreting arbitration agreements. [citations omitted]. The purpose of this rule is "to protect the party who did not choose the language from an unintended or unfair result." *Mastrobuono,* 115 S. Ct. at 1219. This rule applies here: the Bybyks did not draft, edit or alter the Agreement; nor did they have the opportunity to influence the specific provision of the NASD Code (purportedly incorporated into the contract by reference) that now governs their claim in arbitration. Therefore, to the extent that PaineWebber "drafted an ambiguous document . . . they cannot now claim the benefit of the doubt" in construing any ambiguities.

If the disclaimer provision is given serious consideration even in light of the clear intention to subordinate, the NPA would then be ambiguous, and, according to *PaineWebber.*, " . . . a court should construe ambiguous language against the interest of the party who drafted it." "An ambiguous clause is one that is susceptible to two reasonable interpretations." *In re Kam Kuo Seafood Corp.*, 76 B.R. 297, 301(Bankr. S.D.N.Y. 1987). [W]hen some ambiguity exists, it is permissible for the court to resort to extrinsic evidence." *Id.* at 302. If extrinsic evidence does not clarify the ambiguity, it should be construed against the author. *Id.*, citing Restatement (Second) of Contracts, § 206 (1981). Where extrinsic evidence is necessary to interpret a contract, summary judgment may be precluded. *Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017; 1019 (2d Cir. 1985). If extrinsic evidence is not available, or material facts relating to the ambiguity are not in dispute, then the interpretation is a matter of law. *Hartford Accident & Indemnity Company V. Wesolowski*, 33 N.Y.2d 169, ;350 N.Y.S.2d 895 (1973).

In *Care Travel Company, Ltd. v. Pan American World Airways, Inc.*, 944 F.2d 983, 988 (2d Cir. 1991), the Second Circuit, applying New York law, stated: "The determination as to whether the contract language is readily susceptible to one or more interpretations is made by the court with reference to the contract alone." However, extrinsic evidence is not admissible to create an ambiguity. *W.W.W. Associates, Inc., v. Giancontieri*, 77 N.Y.2d 157, 162; 566 N.E.2d 639; 565 N.Y.S.2d 440.

* * *

MHR also contends that its perfected security interest in the Debtor's assets "trumps" LAI's senior status under

the subordination provision in the NPA. MHR relies for its contention upon *Allegaert v. Chemical Bank*, 657 F.2d 495 (2d Cir. 1980). In that case Chemical Bank had two irons in the fire – it held both a security interest in assets of the Debtor and was also a senior creditor due to a subordinated loan agreement. The trustee sought to avoid a payment received by Chemical Bank prior to the filiing [sic] of the petition, and the issue of when Chemical Bank received payment from the Debtor turned on which iron provoked the payment. The Court held that the security interest was paramount as compared to the subordination agreement. *Id.* at 508 ("[T]he operation of the security interest, not the subordination clause, . . . must be taken into account when determining the time and the nature of the transfer to Chemical Bank"). It is not clear how *Allegaert* has any impact on this case, where MHR had agreed in the NPA to subordinate its secured-creditor status to that of LAI. However, the *Allegaert* Court does point out that parties to a contract usually do not negotiate absurd results. *Id.* at 506 n.9.

Third party beneficiary:

The cases of *Akcess Pacific Group LLC, v. Winstar Communications Inc.*, 67 F. Supp. 2d 394, 399 (S.D.N.Y. 1999) and *Piccoli A/S v. Calvin Klein Jeanswear Co.*, 19 F. Supp.2d 157, 162 (S.D.N.Y. 1998), both cited by MHR, recite the law of New York regarding third party beneficiaries. In *In re Gulf Oil/Cities Service Tender Offer Litigation*, 725 F. Supp. 712, 733 (S.D.N.Y. 1989), the court stated

> . . . Although a third party need not be specifically mentioned in the contact before third-party beneficiary status is found, New York law requires that the parties' intent to benefit a third

party must be shown on the face of the agreement.

If the NPA is read in its entirety, LAI meets the tests set forth in *Akcess*, *Piccoli* and *Gulf Oil* as an intended beneficiary of the subordination provision in the NPA, being generically identified on the face of the NPA as a vehicle lessor of vehicles used by the Debtor in its business. *Matter of Associated Teachers of Huntington v Board of Education*, 33 NY2d 229; *Strauss v. Belle Realty Company*, 98 A.D.2d 424; 469 N.Y.S.2d 948 (2d Dept. 1983).

In *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc.* 66 N.Y.2d 38. 44 485 N.E.2d 208; 495 N.Y.S.2d 1 (1985), the New York Court of Appeals stated that the Restatement (Second) of Contracts regarding third party beneficiaries was consistent with prior holdings of the New York court "while clearing away some of the unnecessary differentiations and circuitous language set forth in some of those decisions." The court stated (*id*):

> Recognizing that "the terms 'donee' beneficiary and 'creditor' beneficiary carry overtones of obsolete doctrinal difficulties," the Restatement (Second) of Contracts, has abandoned those terms in favor of "the terms 'intended' beneficiary and 'incidental' beneficiary . . . to distinguish beneficiaries who have rights from those who do not" (Restatement [Second] of Contracts ch 14, Introductory Note, at 439).

In the case of *Barnum v. Millbrook Care Limited Partnership*, 850 F. Supp. 1227, 1233 (S.D.N.Y. 1994), the District Court, citing *Fourth Ocean*, found that Barnum was a third party beneficiary and stated:

> The Restatement (Second) of Contracts provides that a third party is an intended beneficiary to a contract if:
>
> > recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Restatement (Second) of Contracts § 302 (1981).

See also, *Flickinger v. Harold C. Brown & Co., Inc*, 947 F.2d 595 (2d. Cir 1991) ("New York law follows the Restatement (Second) of Contracts § 302 (1979) in allowing a third party to enforce a contract if that third party is an intended beneficiary of the contract.")

The NPA provides subordination rights to vehicle lessors and then appears top [sic] take them away. In a similar situation, a clause disavowing enforcement by an intended third party beneficiary was found to be "nearly nonsensical". "As a matter of public policy, this clause renouncing any intent to benefit third party beneficiaries must fail." *Hossain v. Raucher Pierce Refsnes, Inc.*, 46 F.Supp. 1164, 1168 (D. Kan. 1999). Although it is a Kansas case, the court distinguished *Nepco Forged Products, Inc., v. Consolidated Edison Co. of New York*, 99 A.D.2d 508, 470 N.Y.S.2d 680 (N.Y. App Div. 1984). The Kansas court explained that the putative third party beneficiary in *Nepco* would have had no reasonable claim as a third party beneficiary anyway, so the clause disclaiming third party liability was not decisive.

Nepco is an example of a line of cases where the court ostensibly relied on one catch-all clause in a contract as dispositive where the putative third party beneficiary had little or no chance to prevail regardless of the "dispositive" clause. *E.g., Morse/Diesel, inc., v. Helena Erectors, Inc.*, 859 F.2d 242, 249 (2d Cir. 1988) (provisions in construction contract regarding scheduling and coordination of subcontractors not sufficient to overcome disclaimer); *Edward B. Fitzpatrick, Jr., Construction Corp. v. County of Suffolk*, 138 A.D.2d 446, 449-450, 525 N.Y.S.2d 863 (2d Dept. 1988) (contractor sued county and engineers based on contracts between county and engineers); *Rosier v. Brown*, 158 Misc. 2d 748, 751; 601 N.Y.S.2d 554 (N.Y. Misc.1993) (a presumption that contract intended to benefit third party outweighed by disclaimer).

A Minnesota Court, following the Restatement (Second) of Contracts also rejected the argument that a disclaimer expressing an intent not to benefit third parties preempted any other provisions of a contract affirmatively showing an intent to benefit a third party. *Twin City Construction Company of Fargo, N.D. v. ITT industrial Credit Company*, 358 N.W.2d 716, 718-719 (Minn. Ct. App. 1984).

In construction contracts subcontractors are usually found to be incidental beneficiaries unless the contract expressly states otherwise. *Port Chester Electrical Construction Corp. v. Atlas*, 40 N.Y.2d 652, 656, 389 N.Y.S.2d 327 (1976). An intent to benefit the third party must be shown. *Id.* at 655. Where the putative third party beneficiary is relying upon inferences, presumptions or equitable arguments to sue on a contract between others, it is not unreasonable to find a disclaimer dispositive. However, the holdings of those cases should not be applied where

the explicit language in the agreement also shows an intent to benefit the third party.

New York courts would likely find MHR's position that LAI cannot enforce the subordination rights explicitly provided to vehicle lessors by the NPA to be offensive to public policy, especially when the ambiguity is drafted by the junior creditor. *See Kalisch-Jarcho v. City of New York*, 58 N.Y.2d 377, 385; 461 N.Y.S.2d 746 (1983).

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